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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

JACKIE L. BRADNEY and
JOHN J. HOWARD,
Petitioners,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
PENSION RETIREMENT PLAN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES R. LEICKLY
Counsel of Record
114 MISTY OAK PLACE
COLUMBUS, OH 43230
(614) 475-5174

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTION PRESENTED

Is a finding of "serious consideration" of an early retirement incentive by an employer-fiduciary a prerequisite to a finding of a breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA") § 404(a)(1), 29 U.S.C. § 1104(a)(1)?

PARTIES TO THE PROCEEDING

Petitioner

An individual named Jackie L. Bradney, referred to herein as "Petitioner" or "Bradney." Another individual John Howard, was a party in the action below, but has chosen not to be a party to this Petition for Writ of Certiorari. Petitioner Bradney has no corporate affiliations.

Respondents

E.I. du Pont de Nemours and Company Pension and Retirement Plan, E.I. du Pont de Nemours and Company Severance Pay Policy and/or Career Transition Plan and E.I. du Pont de Nemours and Company are collectively referred to herein as "Dupont" or "Respondent." Dupont has no parent companies, nor, to the best of Petitioner's knowledge, is 10 percent of Dupont owned by a publicly traded company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was rendered August 18, 2000. A copy of the Sixth Circuit Opinion (Case No. 99-3842) is included in Appendix A at 1a-5a. The Opinion of the District Court for the Southern District of Ohio (Eastern Division) is included in Appendix B at 6a-29a. An earlier Opinion of the District Court for the Southern District of Ohio (Eastern Division) which granted in part and denied in part Dupont's motion for summary judgment is included in Appendix C at 30a-72a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on August 18, 2000. No request for an en banc rehearing was made. This Petition for Writ of Certiorari is filed within 90 days of that Opinion. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974
§404(a)(1), 29 U.S.C. § 1104(a)(1)

(a) Prudent man standard of care

(1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims[.]

STATEMENT OF THE CASE

Statement of Facts

Jackie L. Bradney (hereinafter referred to as "Petitioner") commenced his employment at Dupont's Circleville Mylar plant September 15, 1959. Relying on representations by Circleville management that *no* early retirement incentives would *ever* be offered while Circleville was hiring for a joint venture project, Petitioner accepted early retirement under Dupont's standard early retirement program on May 14, 1993, after 33 years of service. (App. B at 7a.) Dupont's Circleville plant then, without any notice or warning, implemented an early retirement incentive on May 24, 1993, despite continuing to hire for the joint venture. The district court found, despite the unequivocal misrepresentations by Dupont, that the misrepresentations were not actionable because the early retirement incentive was not "seriously considered" until May 24, 1993. (App. B at 6a-29a.)

In the early 1990s, Dupont offered early retirement incentives at plants other than Circleville to cut personnel costs. (App. C at 34a.) Petitioner and others close to voluntary retirement age were aware of these early retirement incentives, and were keenly interested in whether such early retirement incentives would be offered at Circleville. Petitioner's supervisors and Dupont Circleville management repeatedly and unequivocally told Petitioner that Dupont would not be offering its early retirement incentive (the Career Transition Plan, or "CTP") in Circleville so long as Dupont was still hiring for a joint venture in Circleville with a Japanese company called Teijin. (App. C at 33a.)

In reliance upon these representations, Petitioner decided that there was no point in waiting for an early retirement incentive to be offered. Petitioner therefore retired on May 14, 1993. The district court found that Dupont decided it could make the CTP available to Circleville employees on May 24, 1993 – only 10 days after Petitioner's retirement. (App. B at 8a.) Had Petitioner not retired when he did, he would have received the incentive. (App. C at 33a.) The CTP early retirement incentive would have provide Petitioner with a one-time lump sum payment of one full year's salary, or about $50,000.

In June, 1993, after learning that he had been given erroneous information by his supervisors in response to his inquiries about whether CTP would be offered at Circleville, Petitioner and another retiree, Hobart Holbrook, who retired on April 30, 1993, wrote to Dupont management, stating:

> Several employees, including us, were upset. We were told several times by different people in management, that as long as we were hiring people to fill vacancies created by retirements

> and by personnel moving to the Joint Venture, we would *never* participate in any kind of incentive retirement plan at the Circleville plant.
>
> We accepted this reasoning and continued to do our jobs. We based our retirement plans on this information repeatedly given to us by management. Then just a few days after our retirement, a new incentive retirement program was announced. (R. 99, Ex. 71.) (Emphasis added.)

This letter succinctly sums up the issues in the case at bar. The issue before this Court is strictly a legal question given that the following facts are not disputed:

- Petitioner would have been eligible, due to age, experience, or both, for the CTP benefit given to one of the 31 exempt employees just days after Petitioner retired.

- Under the CTP, Petitioner would have received one full year's salary had he been able to participate in the early retirement incentive benefit.

- Dupont's supervisors, plant managers and executives all had authority to speak for Dupont regarding the CTP and related retirement issues.

- Petitioner and other employees either at or near retirement age consistently

and repeatedly asked their supervisors, plant manager, and corporate management whether the CTP retirement incentive benefit would be offered at the Circleville plant.

- Petitioner and other employee-beneficiaries were consistently told that Circleville would not offer an early retirement incentive benefit as long as it was hiring for a new plant in Circleville as part of a joint venture with Teijin.

- Relying on these affirmative representations, and assuming what he was being told was true and accurate, Petitioner retired. Petitioner would have postponed retirement had he known of even the possibility that an early retirement incentive would be offered at Dupont.

- Dupont offered the an early retirement incentive benefit, or CTP, at the Circleville plant despite their previous assurances this would not happen, and despite Dupont's continued hiring for the Teijin joint venture.

These facts notwithstanding, the trial court erroneously ruled that an ERISA fiduciary may say and promise anything to a ERISA beneficiary so long there has not been "serious consideration" of an early retirement plan at the time the statement is made.

Petitioner and John J. Howard - who retired on May 10, 1993, but who is not joining in this Petition for Writ of Certiorari - filed a breach of fiduciary duty action in the United States District Court for the Southern District of Ohio (Eastern Division) on December 30, 1994. Petitioner asserted that jurisdiction was proper before the district court pursuant to the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. The complaint cited that jurisdication was appropriate pursuant to 29 U.S.C. § 1132(e) and (f) as well as 28 U.S.C. § 1391.

On May 6, 1998, the district court ruled that the law of the Sixth Circuit requires that an employer-fiduciary "seriously consider" an early retirement incentive before that employer-fiduciary is liable for breach of fiduciary duty or misrepresentation under ERISA. (App. C at 30a-72a.) In that Opinion and Order the district court found that there was evidence that "serious consideration" could have occurred as early as May 6, 1993 - eight days prior to Petitioner's retirement. The district court therefore conducted a trial before a magistrate to determine whether "serious consideration" occurred prior to Petitioner's retirement date.

That trial occurred December 1-3, 1998. The magistrate's ruling that there was no "serious consideration" until May 24, 1993 was affirmed by the district court in an Opinion and Order dated May 25, 1999. (App. B at 6a to 29a.) The district court specifically declined to revisit Petitioner's objection that "serious consideration" should not be given talismanic effect in determining whether a breach of fiduciary duty exists under ERISA. (App. B at 26a-27a.)

Petitioner and Mr. Howard timely appealed this decision to the Sixth Circuit Court of Appeals. Among the assignments of error raised in that appeal were: (1) the

district court erred in making "serious consideration" a prerequisite to a finding of breach of fiduciary duty; and (2) even under a "serious consideration" analysis, Petitioner and Mr. Howard should prevail because the evidence from Dupont's own witnesses demonstrated that "serious consideration" of the CTP occurred *before* Petitioner and Mr. Howard retired.

The Sixth Circuit's August 18, 2000 decision, which did not even address the assignment of error as to whether "serious consideration" should be a prerequisite to a breach of fiduciary duty claim, simply affirmed the district court's decision. (App. A at 1a-5a.)

Petitioner now seeks review of this issue because of the conflict between the Sixth and Second Circuit Courts of Appeal.

ARGUMENT FOR GRANTING WRIT

Serious Consideration is not the Sine Qua Non of an ERISA Fiduciary's Duty to Speak Truthfully to Plan Beneficiaries.

In its May 6, 1998 decision, the district court made these findings of fact:

> Prior to their retirement, Plaintiffs attended various plant meetings where retirement incentives, among other things were discussed. At the times DuPont was pursuing a joint venture with Teijin, a Japanese company. *Plant management officials told the Plaintiffs that the Circleville plant would not offer any*

> *early retirement incentives during the hiring phase of the joint venture. Some of Plaintiffs followed up these meetings with individual conversations with the officials. Again, plant officials told Plaintiffs that the Circleville plant would not offer any early retirement incentives while it was in the hiring mode.*
>
> In June 1993, while still in the hiring mode for the Teijin joint venture, the Circleville Plant announced that it would implement a severance plan known as the Carreer Transition Plan (the "CTP"). DuPont concedes that Plaintiffs would have been eligible to participate in the CTP but for the timing of their retirements. Under the CTP, Plaintiffs would have received approximately one year' salary as a lump sum pay out.

(App. C at 33a.) (Emphasis added.)

Dupont has never officially disputed the fact that these representations were made to its employees. Notwithstanding, Dupont manager Robert J. Dillard testified that if such representations were made, they should not have been. (10/21/96 Dillard dep. at.160-168.) According to Mr. Dillard, a member of the Circleville Site Management team, these representations would have been "illogical" and that "it would not make sense to say that, and I don't believe that anyone said that..." (*Id.* at 167-168.) Yet, as the district court found, Circleville plant management repeatedly made the representations that the benefit would not be offered due to the hiring currently underway and expected at Circleville. (App. C at 33a.)

Inconceivably, Dupont's misstatements notwithstanding, the district court clung to Sixth Circuit precedent and, in essence, held that an employer-fiduciary can make illogical, nonsensical, or untruthful statements to its employees with impunity so long as an early retirement incentive is not then being seriously considered. This "license to lie" given to employer-fiduciaries by the Sixth Circuit contravenes established ERISA policy that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1).

The grant of Petitioner's request for this Court's review is necessary due to the difference in opinion among the circuit courts of appeal. Different courts have set different standards regarding when an employer-fiduciary violates a fiduciary duty under ERISA while making representations to employee-beneficiaries about the availability of early retirement incentives.

The Sixth Circuit held in this case that there can be no misrepresentation by the employer-fiduciary unless that employer-fiduciary has "seriously considered" such an early retirement incentive. In so ruling, the Sixth Circuit relied on its previous decisions in *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988), *Muse v. IBM Corp.*, 103 F.3d 490 (6th Cir. 1996) and, most recently, *McAuley v. IBM Corp.*, 165 F.3d 1038 (6th Cir. 1999). This holding squarely conflicts with the holding of the Second Circuit that "serious consideration" may be a factor, but is *not* a prerequisite to the inquiry as to whether the employer fiduciary has breached its fiduciary duty. *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 122 (2nd Cir. 1997).

The district court set the legal parameters of this case in its May 6, 1998 ruling on a motion for summary judgment filed by Dupont. (App. C at 30a-72a.) The district court's slavish adherence to *Berlin* and its progeny flies in the face of a reasonable analysis of Dupont's actions in this case. The undisputed facts include:

1. Petitioner retired in reliance upon Dupont's representations;

2. Dupont offered the early retirement incentive ("CTP" or Career Transition Plan) within days after Petitioner's May 14, 1993 retirement; and

3. Contrary to Dupont's representations, the hiring for the Teijin joint venture continued unabated after the CTP was offered.

Similarly, the facts of *Ballone* were that management told its employees that there would be no early retirement incentive for a specified time period (two years). The employees argued that they retired in reliance upon those assurances given by management at Eastman Kodak.

In its May 6, 1998 ruling on Dupont's Motion for Summary Judgment, the district court plainly held to Sixth Circuit precedent and eschewed *Ballone*. The district court's language demonstrates the need for this Court's review to resolve the conflict in the circuits. The district court stated:

> Plaintiffs also bring to the Court's attention the Second Circuit case styled *Ballone v. Eastman Kodak Co.* (citation omitted). Plaintiff assert

> that *Ballone* is "on all fours" with this case and that this Court should follow *Ballone* in ruling on DuPont's motion for summary judgment (citation omitted). The Court finds the *Ballone* case inapposite here because the court in *Ballone* expressly rejects the *Berlin* rule applicable to this case.
>
> . . .
>
> Thus the Second Circuit expressly rejected the *Berlin* rule and the rule of the Sixth Circuit. This Court is, of course, bound to follow Sixth Circuit precedent when Sixth Circuit precedent applies. The *Berlin* rule applies to this case. Thus, in ruling on this case, this Court disregards *Ballone*.

(App. C at 47a-48a.)

Even Dupont acknowledges the dramatic difference in the law between the Second and Sixth Circuits.

> . . . the Bradney Plaintiffs argue on appeal that the nature of CTP benefits attributed to DuPont warrant application of the law set forth in *Ballone* (citation omitted) - a decision that rejects the law of this Circuit.

Final Brief of Dupont to Sixth Circuit Court of Appeals at 26 (emphasis in the original).

Clearly, this holding creates a "bright line" issue for review by this Court. The district court found facts substantially similar to the facts in *Ballone*, but then

disregarded *Ballone* because it is expressly at odds with the law of the Sixth Circuit.

The district court declined to revisit its prior ruling in its subsequent May 25, 1999 Opinion and Order. (App. B at 26a-27a.) Under the district court's holding, there is no circumstance under which an employer as plan fiduciary could ever make any misrepresentation about the potential offering of an early retirement incentive as long as such a plan is not under "serious consideration."

Petitioner appealed the district court's decision on the basis that, pursuant to *Ballone,* the district court erred in ruling that serious consideration was a prerequisite to a finding that Dupont breached its fiduciary duty to Petitioner. The Sixth Circuit blindly applied *Berlin* and its progeny in its August 18, 2000 opinion. (App. A at 1a-5a.) That opinion only discusses whether "serious consideration" exists – not whether it is required in the first instance.

The requirement of "serious consideration" imposed in this case misstates, and misconstrues, the purpose and policy of ERISA fiduciary law. The questionable result of the "serious consideration" mantra is that employer-fiduciaries may represent – with impunity – virtually anything to their employee-beneficiaries about their pension plans. The employer-fiduciary may even deceive employee-beneficiaries about future plan benefits in order to induce them to retire so long as the employer-fiduciary is not "seriously considering" implementation of the future benefits. Plainly, this result is not supported by any rational interpretation of ERISA law. The facts of this case undermine the logic of requiring a factual finding of serious consideration. Petitioner believes that an ERISA fiduciary may be liable for making a misrepresentation if: 1.) a representation was made; 2.) the

representation is a misstatement or is inaccurate; and 3.) the Plan Beneficiary relied upon those representations to his detriment.

Affirmative misrepresentations about future changes to an employee benefit plan are actionable as a breach of fiduciary duty under ERISA. *Ballone, supra*, at 122. Here, the CTP was already in existence when Dupont made its erroneous representations. Dupont officials told Petitioner and other potential employee-beneficiaries that absolutely no CTP retirement benefit would be offered so long as hiring continues at the Circleville plant.

The Court in *Ballone* held:

> Where an ERISA fiduciary makes guarantees regarding future benefits that misrepresent present facts, the misrepresentations are material if they would induce a reasonable person to rely upon them. *Id.*

Petitioner made his decision to retire based on what he was told by Dupont. Whether a plan is under serious consideration is but one factor in the materiality inquiry. *Id.* at 123. *Ballone* strikes the balance missing in the proposition of law set forth by the trial court in this case. It permits the necessary analysis, mentioned above, of: 1.) what was said; 2.) whether it was misleading; and 3.) whether it caused affected persons to rely to their detriment.

The analysis employed in *Berlin* – and later in *Muse* and *McAuley* – simply makes no logical sense given the facts of the instant case. Other circuits have followed the *Berlin* analysis, making review by this Court a necessity. *See Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3d Cir.

1996), *Hockett v. Sun Co., Inc.*, 109 F.3d 1515 (10th Cir. 1997), *Barnes v. Lacy*, 927 F.2d 539 (11th Cir. 1991) and *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399 (8th Cir. 1995).

Ballone notes that an employer's consideration of changes to a plan is but one aspect of the materiality of the alleged misrepresentations, *not* a prerequisite to the fiduciary's duty to speak truthfully when making disclosures to plan beneficiaries. *Ballone*, 109 F.3d at 123. *Ballone's* holding "that a plan administrator has a fiduciary duty not to make material misrepresentations regarding the availability of future plan benefits" is also in accord with this Court's pronouncement in *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996). *Ballone*, 109 F.3d at 123. "If an employer makes false assurances about future benefits, the materiality of the misstatements turn primarily on the nature and the context of the assurance." *Id.* at 124. False assurances regarding the availability of future benefits and ruling them out for a specified period of time can be decisive in inducing an employee to retire now rather than waiting for the future benefits. *Id.* This is exactly what occurred in the case at bar.

Despite various circuits following the *Berlin* analysis, there is evidence that the First and Ninth Circuits are at least sympathetic to *Ballone*. For example, the First Circuit dealt with the issue and found that a *Ballone* analysis could be appropriate under certain circumstances. In *Vartanian v. Monsanto Co.*, 131 F.3d 264, 269 (1st Cir. 1997), the court stated:

> "Although the district court in *Ballone*, like the district court here, dismissed ERISA claims because of the lack of any evidence of 'serious consideration,' 109 F.3d at 122, the

> complaint in *Ballone* alleged that the employer falsely informed the inquiring plaintiff that the company had decided not to offer an early retirement plan for at least two years."

Vartanian concluded, "It seems reasonable that where an allegation of positive misrepresentation is involved, that 'aspect of the assurance can render it material regardless of whether future changes are under consideration at the time the misstatement is made.'" *Id.*

Vartanian could not employ the *Ballone* analysis only because the facts before that court did not support it. *Id.* at 269 ("[We] therefore have no occasion to consider whether we would apply *Ballone* in an appropriate case.") The case at bar is virtually identical to *Ballone*. Petitioner has alleged having been affirmatively misled – and has provided evidence that this in fact occurred.

As *Vartanian* suggests, blindly applying *Berlin's* serious consideration requirement under these facts would subvert the very purpose of ERISA and create law never contemplated under ERISA. The Ninth Circuit has endorsed the *Vartanian* analysis. *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042 (9th Cir. 2000). *Bins* utilized "serious consideration" but warned that "flexibility" is necessary in cases where an employer circumvents ERISA "by carefully patterning its conduct so as to evade" the factors set forth in a "serious consideration" analysis.

The materiality of a misrepresentation necessarily differs depending on the context of the assurance being made by a fiduciary. It is recognized that plan beneficiaries often rely on these fiduciary assertions in making retirement decisions.

Dupont decided to advise its senior exempt employees, including Petitioner, that the retirement incentive benefit would not be used while Circleville was hiring for the Teijin joint venture. These representations were firm, absolute, and material in every sense of the word. These representations were consistently and repeatedly made by Dupont management. The representations were false.

It is an undisputed fact that Hobart Holbrook, an exempt front-line supervisor like Petitioner, inquired so often that he asked about the benefit the very day prior to submitting his retirement on April 30, 1993 (14 days prior to Petitioner's retirement). His inquiries became a standing joke among employees and management alike. The day before his retirement, Holbrook was again told there would be no use of the benefit. Just a couple of weeks later, Dupont reversed its stated course and offered the retirement incentive benefit, or CTP.

Petitioner and other Dupont employees, as ERISA beneficiaries, made decisions based on the information provided in response to their repeated questions concerning availability of CTP. These decisions to retire based on the unequivocal management representations that the incentive benefit would never be offered so long as the plant was hiring.

These facts buttress the Second Circuit's opinion in *Ballone* that serious consideration should not be the *sine qua non* of materiality in regards to ERISA misrepresentations. Misrepresentations repeatedly made about the benefit constitute breaches of fiduciary duty by the employer-fiduciary Dupont.

ERISA requires that a plan fiduciary "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. §1104(b); *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 8 (2nd Cir. 1997). Courts of appeals in jurisdictions other than the Second Circuit have routinely held "that ERISA fiduciaries must provide complete and accurate information in response to beneficiaries' questions about plan ... benefits." *Id.* Petitioner suspected - and Dupont management was aware - that the only possible outcome given the then existing economic conditions for the company, was a significant reduction of employees using the one time incentive benefit of CTP. Dupont's representations that its joint venture hiring would obviate the need for a Circleville CTP made sense to its employees contemplating retirement. Indeed, the October 6, 1992 Dupont memo announcing CTP also inferred that there would be no early retirement opportunities.

Becker notes that it is not alone among the federal courts in holding that "ERISA fiduciaries must provide complete and accurate information in response to beneficiaries' questions about plan ... benefits." *Id.* Even the Sixth Circuit has stated that: "ERISA imposes a duty upon fiduciaries to respond promptly and adequately to employee-initiated inquiries regarding the plan or any of its terms." *Electro-Mechanical Corp. v. Ogan*, 9 F.3d 445, 451 (6th Cir. 1993). Plainly, Dupont should not have responded to the Petitioner and other potential employee-beneficiaries as it did. To make statements - both written and verbal - assuring Retirees that the benefit would not be offered was reckless at best and intentional at worst.

The duty of a fiduciary extends not only to not misinform, but also "to convey to a lay beneficiary . . . correct and complete material information about his status and

options." *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 748-749 (D.C. Cir. 1990). A fiduciary "has a fiduciary obligation to respond promptly and adequately in a way that is not misleading." *Switzer v. Wal-Mart Stores, Inc.*, 52 F.3d 1294, 1299 (5th Cir. 1995). Under ERISA, fiduciaries must also communicate material facts affecting the interests of beneficiaries. *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993).

CONCLUSION

"Serious Consideration" should have no talismanic significance when evaluating whether an ERISA fiduciary responded accurately to an inquiry of a plan beneficiary about plan benefits. This is especially true when the beneficiary is making the most important decision to be made under ERISA pension plans – whether to retire and accept the plan benefits. This Court should adopt the test set out in *Ballone*.

Under *Ballone* analysis, if an employer-fiduciary misstates future the potential for changes in a retirement benefit plan, the fact that such changes have not been "seriously considered" is not determinative as to whether the misstatement was materially misleading under ERISA.

The Sixth Circuit's current test, as enunciated by *Berlin* and its progeny, is not congruous with ERISA law which requires that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries. . . ." 29 U.S.C. 1104(a)(1). Nor is the Sixth Circuit's "serious consideration" test in accord with this Court's pronouncement in *Varity*.

The guidance of the Supreme Court is necessary to settle this disagreement among the circuit courts of appeal and to prevent unfairly adverse results to employee-beneficiaries.

For these reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted and that this case be remanded.

Respectfully submitted,

(motion for admittance filed)
James R. Leickly, Esq.
Counsel of Record

James R. Leickly,
Attorney at Law
114 Misty Oak Place
Columbus, Ohio 43230
(614) 475-5174

James P. Connors, Esq.
221 S. High Street
Columbus, Ohio 43215
(614) 221-6868

Eugene R. Butler, Esq.
326 S. High Street, Suite 400
Columbus, Ohio 43215
(614) 221-3882

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed August 18, 2000]

No. 99-3842

JACKIE L. BRADNEY and JOHN J. HOWARD
Plaintiffs-Appellants,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, PENSION RETIREMENT PLAN ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Ohio

BEFORE: MERRITT, KRUPANSKY and BOGGS, Circuit Judges.

OPINION

MERRITT, Circuit Judge. In *McAuley v. IBM*, 165 F.3d 1038, 1043 (6th Cir. 1999), we held under ERISA that a company contemplating offering in the future an early retirement plan with added incentives must disclose the possibility to employees once the new plan is being "seriously considered" by management. The purpose of this requirement is to allow employees who might otherwise retire without the new benefits to see whether they would be better off by waiting for the new plan to go into effect. The question before us in this case is whether DuPont was "seriously considering" such a plan at its plant in Circleville, Ohio, and had a duty so to inform plaintiffs before they took regular retirement. Such a "serious consideration" test requires the trial court to assess the state of mind of company managers concerning the implementation of a potential new retirement plan.

This appeal arises from the implementation of a Career Transition Plan at the Circleville, Ohio, Mylar polyester film plant. Employees were informed that they would be able to voluntarily participate in this plan providing increased retirement benefits shortly after the retirement of plaintiffs Bradney and Howard on May 14, 1993. Plaintiffs argue that DuPont had a duty to inform them of the new plan prior to their retirement because plaintiffs believe DuPont "seriously considered" implementation of the plan prior to that time. After a trial on the merits, the District Court found that DuPont did not "seriously consider" implementation of the CTP until May 24, 1993. For the reasons outlined below, we AFFIRM the judgment of the District Court.

Plaintiffs Bradney and Howard each were employed by DuPont in the Mylar polyester films plant in Circleville, Ohio, for over 30 years. Both plaintiffs had retired by May 14, 1993. Prior to retirement, both plaintiffs had asked their DuPont superiors whether a retirement incentive plan would be offered in the near future at the Circleville site. When questioned, DuPont responded that the Circleville plant would not be utilizing a retirement incentive plan for two reasons: First, the population of the Circleville plant was more advanced in age than the populations of other DuPont facilities that had such plans; thus a higher attrition rate at Circleville would provide for any needed reduction in personnel. Second, the Circleville plant was engaged at the time in a joint venture with Teijin, and was in a hiring mode. In June, 1993, Circleville employees were informed that the Career Transition Plan would be employed whereby employees could volunteer to retire early with added benefits.

The court below rightly followed the test outlined in *McAuley v. International Business Machines Corp., Inc., supra*. Under the *McAuley* analysis, a court should first ask whether the employer was focusing on a particular plan for a particular purpose. *See Muse v. International Business Machines Corp.*, 103 F.3d 490, 494 (6th Cir. 1996). Second, a court should examine whether a specific proposal was being discussed for purposes of implementation by senior management with the authority to implement the change. *See McAuley*, 165 F.3d at 1043-44. This test is somewhat vague, but it seems meant to distinguish proposals that are being "seriously considered" from those that are merely being analyzed, discussed or reflected upon in a preliminary manner.

We do not believe that the District Court was "clearly erroneous" in its factual finding that DuPont managers did not "seriously consider" implementation of the new plan at Circleville prior to May 14, 1993. The testimony was clear that Milliken, the plant manager at Circleville who had the authority to make the ultimate decision regarding implementation of the new plan,, was against its use because it did not contain a volunteer component and would therefore rid Circleville of its younger employees. As of a meeting held on May 12-13, this remained Milliken's position, according to testimony. On May 19, 1993, Milliken summarized his restructuring ideas. His summary indicated a reluctance to use the new plan. Only on May 24, 1993, when Milliken received word from DuPont headquarters that he would be allowed to *vary* the plan so as to allow employees to volunteer to retire in exchange for increased benefits did he immediately began the process of informing employees of that option. Although the factual issue is not entirely free from doubt, we do not believe that the District Court was clearly erroneous in so finding. Milliken's notes made after the May 12-13 meeting do not necessarily undermine Milliken's testimony to this effect. We do not ordinarily reverse - and are not inclined to reverse in this case - a District Court's credibility findings.

In addition, plaintiffs appeal the district court's dismissal of their discrimination claim under section 1140 of ERISA, which prohibits discrimination against a plan participant or beneficiary for exercising rights or interfering with the attainment of rights under the plan. In order to prevail on such a claim, plaintiffs must show that DuPont had the specific intent to violate ERISA. We believe the district

court was correct in its finding that plaintiff has not shown that DuPont had such an intent.

Finally, plaintiffs argue that DuPont should be equitably estopped from denying plaintiffs benefits under the Career Transition Plan. Generally, state law claims based on an employer's alleged misrepresentations about the availability of a benefit plan are sufficiently related to an ERISA plan to be preempted by the statute. As such, the district court correctly denied plaintiffs' claims under this theory.

Accordingly, the judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed May 25, 1999]

No. C-2-94-1265

JACKIE L. BRADNEY, et al.,
Plaintiffs,

v.

EI DU PONT DE NEMOURS AND COMPANY, PENSION FUND RETIREMENT PLAN, et al.,
Defendants.

OPINION AND ORDER

This matter is before the Court on Plaintiffs' objections to the Magistrate Judge's Report and Recommendation filed March 22, 1999 pursuant to 28 U.S.C. § 636(b)(1) and Southern District of Ohio, Eastern Division Order No. 91-3, I., pt. F, div. 6. Though the Court initially stated that it would hold oral arguments, the Court finds that the issues before it are sufficiently clear and that oral arguments are no longer necessary. For the reasons set forth

arguments are no longer necessary. For the reasons set forth below, the Court **OVERRULES** Plaintiffs' objections. Furthermore, the Court **ADOPTS** the Report and Recommendation of the Magistrate Judge and **ORDERS** the Clerk of Courts to enter **JUDGMENT** for Defendants and against Plaintiffs.

I. BACKGROUND

Although the Report and Recommendation sets forth very detailed findings of fact, the Court briefly summarizes the background of this case. Plaintiffs Jack Bradney and John Howard are former employees of Defendant E.I. DuPont de Nemours and Company ("DuPont") who worked at DuPont's Circleville, Ohio plant. Plaintiffs bring three causes of action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 - 1461 (1994) against Defendants DuPont and others.

Plaintiffs Bradney and Howard retired on May 14, 1993 and May 10, 1993 respectively. In the month after Plaintiffs retired, DuPont implemented the Career Transition Plan ("CTP") – an employee benefit plan – at the Circleville plant. If Plaintiffs would have retired under the CTP, they would have been eligible to receive additional benefits. Plaintiffs' chief allegations are that Defendants misled them as to the status of DuPont's decision to implement the CTP at the Circleville plant. The key issue necessary to resolve Plaintiffs' claims is when DuPont first "seriously considered" the use of the CTP at Circleville.

In her Report and Recommendation, Magistrate Judge King found that the testimony of Lynn Millikin, plant

manager of the Circleville plant, was "most instructive" to determine the date that serious consideration occurred. As plant manager, Millikin made the ultimate decision to use the CTP at the Circleville plant. (Doc. # 105 at 23.) Based, in large part, upon Millikin's testimony, the Magistrate Judge held that DuPont did not seriously consider implementing the CTP at Circleville until May 24, 1993 – ten days after Bradney retired and two weeks after Howard retired from DuPont. Because of this finding, the Magistrate Judge held that Plaintiffs could not make out a claim of breach of a fiduciary duty under ERISA because DuPont had no duty to warn Plaintiffs until May 24, 1993 about possibly implementing the CTP. Furthermore, the Magistrate Judge held that Plaintiffs could not make out either a claim of discrimination under ERISA nor a claim for equitable estoppel.

Plaintiffs object to the Magistrate Judge's findings on a number of grounds. The Court considers Plaintiffs' arguments below.

II. STANDARD OF REVIEW

The standard of review of a Magistrate Judge's decision is set forth in 28 U.S.C. § 636(b)(1) (1994). If a party objects to a portion of the Magistrate Judge's Report and Recommendation, the Court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Thus, the Court makes a de novo determination of the portion of the Magistrate Judge's Report and Recommendation to which Plaintiffs make specific objections.

III. ANALYSIS

In their objections to the Magistrate Judge's Report and Recommendation, Plaintiffs raise essentially two separate challenges. In eight separate objections, Plaintiffs first challenge the Magistrate Judge's finding as to the timing of the decision to implement the CTP and argue that serious consideration occurred before May 24, 1993. Plaintiffs also challenge some of the Magistrate Judge's evidentiary rulings. After reviewing the law and making the required de novo findings of fact, the Court considers Plaintiffs' objections to the timing before considering the evidentiary objections.

A. Serious Consideration

Although the Court clearly set forth the law in its earlier Opinion and Order of May 6, 1998 and in the Report and Recommendation of the Magistrate Judge, the Court briefly summarizes the law with respect to "serious consideration." As the Sixth Circuit recently noted, an ERISA fiduciary is not generally required to disclose changes in a benefit plan until that plan is adopted. See McAuley v. IBM Corp., 165 P.3d 1038, 1043 (6th Cir. 1999). However, where an employer gives "serious consideration" to a change in benefit plans, the employer has a fiduciary duty not to make any intentional or negligent misrepresentations to potential plan participants. See id. (citing Drennan v. General Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992)). An employer with this duty does not need to predict the eventual details of the plan, but the employer must instead let affected employees know of the progress of the employer's serious considerations. See id.

The Sixth Circuit uses two different definitions of "serious consideration." In 1996, the Sixth Circuit held that serious consideration occurs when a company "focuses on a particular plan for a particular purpose." See id. (quoting Muse v. IBM Corp., 103 F.3d 490, 494 (6th Cir. 1996)). Recently in the McAuley decision, the Sixth Circuit quoted with approval the definition of serious consideration as formulated by the Third Circuit. See id. (quoting Fischer v. Philadelphia Elec. Co., 96 F.3d 1533, 1539 (3d Cir. 1996), cert. denied, 117 S. Ct. 1247 (1997)). The Third Circuit stated, "Serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change . . . ." Fischer, 96 F.3d at 1539. Thus, in order to find that a company seriously considered a proposal, the Court must find the exact time that a company focused its attention to a specific proposal designed to change a benefits plan.

Despite quoting the Third Circuit's definition with approval and despite applying the Fischer test to the case before it, the Sixth Circuit did not expressly adopt Fischer. Instead, in McAuley, the Sixth Circuit applied both the Muse test and the Fischer test to the facts and concluded that under either test the district court improperly granted summary judgment. See McAuley, 165 F.3d at 1044-45. Consequently, the Court must apply both tests to the facts at hand in order to determine when DuPont first "seriously considered" the use of the CTP at Circleville.

B. Findings of Fact

Before applying this law, the Court must make particular findings of fact. Following a de novo review of the record, the Court adopts the following timeline of events as set forth by the Magistrate Judge in her Report and Recommendation:

On May 6 and May 7, 1993, DuPont's Films strategic business unit ("SBU") met in Wilmington, Delaware to discuss, among other things, the state of affairs of the SBU. The Films SBU included eight manufacturing plants, including Circleville and a plant in Florence, South Carolina, that manufactured film-based products such as Mylar. During the first part of 1993, the Films SBU did not have a good first quarter from a financial standpoint. In fact, Michael Hartnagel, the former vice-president and general manager of the Films SBU, concluded that the Films SBU could fall short in its financial expectations by as much as $20 million. Accordingly, at the May 6 and 7 quarterly meeting, plant managers such as Millikin came to the meeting knowing that they would need to develop a plan to enable the Films SBU to meet its financial expectations.

Hartnagel presided over the meeting. He directed the participants to engage in a brainstorming session to come up with a plan to ease the financial crisis that the Films SBU was experiencing. Hartnagel specifically told plant managers and other participants at the meeting to get "ahead of the competitive curve." In other words, Hartnagel wanted plant managers to develop a long-term plan so as to avoid the need to restructure the Films SBU each year.

The meeting produced twenty-eight separate suggestions. Hartnagel divided the suggestions into four categories and assigned four subgroups to consider the suggestions and report back to the full group in early June 1993. One of the four subgroups, Group I, led by Benjamin Waide, Director of Operations of the Films SBU, considered personnel issues.

Significantly, those present at the May 6 and May 7 meeting never considered any specific personnel decisions. Though testimony from the hearing before the Magistrate Judge reveals that Michael Carroll, the Human Relations director the Films SBU, mentioned the CTP at the meeting, the record reveals that Carroll mentioned the tool only in a general way and never discussed the specifics of how the CTP worked.

One week later, on May 12 and May 13, 1993, Group I met in Baltimore to consider various methods to reduce the cost structure of the Films SBU by $4 to $6 million. Waide, the Group I leader, and Carroll met prior to the meeting and decided to perform a "zero-based restructuring analysis" at the meeting. Under this analysis, the subgroup would separate those tasks that were essential to the SBU from those tasks that were discretionary. The analysis would then require the subgroup to reduce costs by focusing on the operating costs for each set of tasks and eliminating the tasks that were not cost-effective. In this manner, the analysis did not contemplate the elimination of specific job positions, only the elimination of specific tasks within the SBU.

At the Group I meeting, one plant manager asked about how personnel would be released. Carroll informed the

group that they must use the CTP if positions were eliminated. Carroll provided a summary of the CTP. The CTP is a management based selection tool that redeploys excess personnel and provides financial benefits through a program called Career Transition Financial Assistance. The CTP gives plant managers a high level of control over which employees would be redeployed or terminated. At the meeting, the group also agreed that the "Reconciliation Selection Process" ("RSP") would be used as tool by plant managers to determine who would be affected by the CTP. The RSP did not allow for personnel to volunteer to participate in the CTP.

At the time of the Group I meeting on May 12 and May 13, Millikin did not believe that he would use the CTP at Circleville. Millikin was confident that, through normal attrition of its workers, Circleville would meet its financial goals without the use of the CTP. In fact, Millikin believed that the CTP was an unacceptable plan because of the effect that the RSP would have on personnel at Circleville. Millikin believed that the CTP, as initially formulated, would eliminate junior workers while keeping a number of senior employees. Millikin believed that the CTP could eventually lead to a plant "without skills." (Doc. # 105 at 13.) Because of these concerns, Millikin asked Carroll whether the CTP would allow for an element of voluntariness whereby senior workers could volunteer to take the place of a junior worker who was determined to be excess.

A day after the Baltimore meeting, on May 14, 1993 (the same day that Plaintiff Bradney retired), Millikin met with leaders at the Circleville plant. Millikin instructed the leaders to implement the zero-based restructuring analysis.

On May 19, 1993, Millikin summarized the results of the zero-based analysis and discovered that the list of excess employees included many younger workers, all of whom had less than fourteen years of experience. Millikin again concluded that implementing the CTP, as then formulated, to either redeploy or lay off these excess workers would devastate the Circleville plant and mortgage the future of Circleville.

On May 21, 1993, Carroll met with William Reynolds, DuPont's Director of Human Resources, to discuss the possibility of implementing the CTP with a voluntary component so that so many junior workers would not lose their jobs. Reynolds agreed to look into the matter with DuPont corporate officials.

Group I met again on May 24 and May 25, 1993, in Wilmington. At the meeting, Millikin presented the results of the zero-based restructuring at Circleville. At some point during the meeting, Carroll left to speak with Reynolds. Reynolds informed Carroll that DuPont agreed that plant managers could seek "expressions of interests" from non-excess personnel if the CTP were used at any plant. Carroll then told the group about the news; Millikin immediately called Circleville and directed his subordinates to let employees considering retirement know about the consideration of the CTP at Circleville. At the conclusion of the meeting, Carroll agreed to formulate guidelines for implementing the CTP with expressions of interest from employees. Further, at the conclusion of the meeting, Millikin testified that at that point he believed that the CTP was a viable option to use at Circleville to cut costs.

Later, in early June 1993, the four subgroups reconvened to discuss their recommendations. Shortly thereafter, Hartnagel adopted the various recommendations and authorized restructuring the Films SBU. Most significantly to this lawsuit, Hartnagel agreed to allow plan managers to utilize the modified CTP allowing for expressions of interest if they need to do so. On June 11, 1993, Millikin decided to implement the CTP at Circleville and sought expressions of interest from employees. On June 20, 1993, Millikin implemented the CTP in order to reduce Circleville's staff by thirty-one employees.

C. Challenges to the Timing

With these findings of fact, the Court applies the facts to the law of this case by examining Plaintiffs' eight objections to the finding that serious consideration of the CTP occurred on May 24, 1993.

1. Objection One - "The Magistrate Judge Erred by Misinterpreting the Law of the Sixth Circuit as to When 'Serious Consideration' Occurs."

In their first objection, Plaintiffs claim that the Magistrate Judge "obliterates any practical distinction between an actual decision date and serious consideration." (Doc. # 108 at 3.) The Court finds that this argument is without merit.

Plaintiffs accurately point out that this Court denied summary judgment to Defendants by finding that a genuine issue of material fact remained that serious consideration of

the CTP at Circleville could have occurred as early as May 6, 1993. This determination in ruling on a summary judgment motion does not mean, however, that the Magistrate Judge's determination that serious consideration did not occur until May 24, 1993 is in error. Instead, the difference between the decisions lies in the procedural posture of this case.

During the hearing, Plaintiffs bore the burden of proving by a preponderance of the evidence that serious consideration occurred before May 14, 1993. Plaintiffs failed to meet that burden. On the other hand, when the Court ruled on Defendants' motion for summary judgment, Plaintiffs bore the burden of creating a genuine issue of material fact on those issues on which they bore the burden of proof at trial; Plaintiffs did not bear the burden of proving their case.

After reviewing the record, the Court finds that Plaintiffs failed to meet their burden of proving that serious consideration occurred before May 14, 1993. Instead, the Court agrees with the Magistrate Judge that May 24, 1993 is the date on which serious consideration occurred.

Nevertheless, Plaintiffs insist that serious consideration occurred on May 6 and 7, at the latest. Plaintiffs' argument fails to persuade this Court. In support of their argument, Plaintiffs list numerous "factors" that they claim were ignored by the Magistrate Judge. (Doc. # 108 at 4-5.) Regardless of whether or not the Magistrate Judge ignored these missing "factors," Plaintiffs themselves ignore a basic fact essential to this Court's determination: Millikin, and no one else, made the final determination on whether to use the CTP at Circleville. Millikin believed that the CTP was not even an option to consider until May 24, 1993 and

did not implement the CTP until June 20, 1993. Indeed, even though the CTP was the only tool available to plant managers to use to deal with excess personnel, Millikin did not believe that he would need to lay off any personnel until after the May 12 and 13 meeting in Baltimore. Thus, on May 6 and May 7, 1993 at the meeting in Wilmington, Millikin did not seriously consider using the CTP as he did not believe at that time that the CTP was even necessary.

In ignoring this key fact, Plaintiffs argue that there was "no time for 'serious consideration,'" unlike the three-and-a-half months of serious consideration as "found" by the court in McAuley. (Id. at 5.) Plaintiffs incorrectly argue that May 24, 1993 was the decision date and, that on that date, Millikin decided to use the CTP. This argument apparently discards the period of about a month from when Millikin first considered the CTP as an option (May 24, 1993) and the date in which he decided to implement the CTP (June 20, 1993).

Next, Plaintiffs rely on the consideration of evidence that this Court found created a genuine issue of material fact when ruling on Defendants' motion for summary judgment. As noted above, this Court's finding that there was some evidence that Millikin "was forced to entertain" the CTP on May 18, 1993, does not mean that Plaintiffs proved this point by a preponderance of the evidence. Instead, this Court and the Magistrate Judge considered the evidence and determined that Plaintiffs failed to meet their burden of proof that serious consideration occurred prior to May 24, 1993. Furthermore, even if serious consideration occurred on May 18, 1993, Plaintiffs fail to state a claim for relief because Plaintiff Bradney retired on May 12, 1993 – before any serious consideration occurred.

Based upon all the evidence presented to the Court, the Court concludes that serious consideration occurred on May 24, 1993. Only as of that date did Millikin have a specific proposal – the CTP with the element of voluntariness – discussed for the purposes of implementation by senior management with the authority to implement the change. On the other hand, as of May 6 and May 7, 1993 Millikin did not even consider the CTP. The most that the Court finds about the status of the CTP at that point is that Carroll briefly mentioned without describing the CTP. Therefore, the Court OVERRULES Plaintiffs' first objection.

2. **Objection Two - "The Plaintiffs Object that the Magistrate Judge Failed to Recognize that, Under the Law of the Sixth Circuit, Serious Consideration Occurs When an Employer 'Focuses on a Particular Plan for a Particular Purpose.' The Magistrate Judge Makes the Finding But Ignores the Significance of the Fact that, as of January 1, 1993, CTP was the One and Only 'Particular Plan' for the 'Particular Purpose' of Excessing and Removing Employees from DuPont."**

Plaintiffs' second objection focuses again on the date of serious consideration. Plaintiffs argue that serious consideration occurred as early as January 1, 1993, because the CTP was the only plan to deal with excess employees. Because the Court finds that serious consideration occurred on May 24, 1993, the Court need not address this issue. Furthermore, the Court previously held that serious consideration did not occur until at least May 6 or May 7,

1993. (Doc. # 77 at 38-39.) The Court will not reconsider its prior ruling. Finally, the Court reiterates that although DuPont adopted the CTP in January 1993 "as a corporate tool for controlling costs, there is no dispute that a decision to implement the CTP at the Circleville plant was necessary before" Plaintiffs would be eligible to participate in it. (Id. at 23.) Hence, the Court finds that Plaintiffs' argument that serious consideration occurred in January 1993 is again without merit. The Court **OVERRULES** Plaintiffs' second objection.

3. **Objection Three - "Plaintiffs object that the Magistrate Judge failed to recognize that by May 6-7, 1993 DuPont had met the three criteria of serious consideration set forth in *Fischer II* and described more fully in *McAuley*[.]"**

In their third objection, Plaintiffs again argue that serious consideration occurred on May 6 and 7, 1993. Once again, because the Court finds that serious consideration occurred on May 24, 1993, this Court need not address Plaintiffs' third objection. However, as noted above, on May 6 and 7, 1993, Millikin had not decided on a specific proposal for cutting costs that would affect Plaintiffs. In other words, Millikin did not consider a particular plan for a particular purpose. See McAuley, 165 F.3d at 1043; Muse, 103 F.3d at 494. Further, the brief mention by Carroll of the CTP on May 6 or May 7 did not constitute a discussion of that plan for implementation. Finally, Millikin, the senior manager with authority to implement the change, did not consider the CTP as an option until late May 1993, more than two weeks after May 6 and May 7. Accordingly, using either the factors

set forth in Fischer, 96 F.3d at 1539, or the test in Muse, 103 F.3d at 494, serious consideration did not occur on May 6 and May 7, 1993. The Court **OVERRULES** Plaintiffs' third objection.

4. **Objection Four - "Plaintiffs Object that the Magistrate Judge Erred in Her Factual Finding that CTP, in its Final Form, Did Not Allow For Volunteers to Accept an Offering. Exhibit 56 Was the Actual Plan Itself and Clearly Promotes the Notion of Volunteerism."**

In their fourth objection, Plaintiffs argue that the CTP always had a voluntarism element to it – even before May 24, 1993 when DuPont officials informed Millikin that he could use a component of voluntarism for the CTP. Plaintiffs contend that the Magistrate Judge "completely discounts and ignores all the evidence with respect to the CTP's own language and terms about being a voluntary program for which Plaintiffs would have been eligible." (Doc. # 108 at 17.) Plaintiffs argue that, because the CTP uses language contemplating voluntariness, Millikin should have known that he could ask for voluntary selection from his employees before May 24, 1993. The Court finds this argument to be wholly without merit.

To understand this argument, the Court must give a little more background of the events surrounding the decision to implement the CTP at the Circleville plant. Millikin gave extensive testimony that he did not believe that the CTP, as initially drafted and as presented by DuPont, would work at Circleville. Under the provisions of the CTP, plant

management selects employees for participation in the plan. Furthermore, with respect to nonunion employees such as Plaintiffs, the CTP, as initially drafted and presented by DuPont, did not allow for an element of voluntary selection.[1]

Instead, DuPont implemented the CTP by use of one of three tools to determine which employees would be affected. The three tools included the "Reconciliation Selection Process" ("RSP"), the "Last In First Out" tool and the "Qualified Based Selection" tool. The tool used by DuPont in this case, the RSP, did not provide for an element of voluntary selection. In fact, the RSP required management to staff positions based upon certain criteria. Under the provisions of the RSP, neither Plaintiff qualified to participate in the CTP.

Millikin provided credible testimony that he did not believe the CTP would work as promulgated by DuPont. Because the RSP did not have an element of voluntary selection and because the RSP required that older employees with more years of service be retained while younger employees be let go, Millikin feared that he would be mortgaging the future of the Circleville plant. As the Magistrate Judge noted, "Millikin affirmatively rejected the idea of the CTP, as the program was then formulated, because of the devastating impact it would have on the ranks of younger, skilled professionals at Circleville." (Doc. # 105 at

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[1] As the Magistrate Judge noted, the CTP clearly contemplates a component of volunteerism in the application of the CTP. (Id. at 5.) Nevertheless, DuPont did not allow the element of volunteerism in the CTP as applied to nonunion personnel at Circleville such as Plaintiffs until after May 24, 1993.

12.) In addition, "Millikin believed that the CTP, as then formulated, would eliminate most of the younger employees and would lead eventually to a site without skills." (Id. at 12-13.) The only way to avoid the drastic consequences of the RSP, according to Millikin, was to allow older employees to voluntarily agree to retire with the younger employee's CTP "package." However, Millikin and Carroll both testified that, until May 24, 1993, DuPont's CTP did not allow this option to occur. Accordingly, the CTP as proposed by DuPont officials before May 24, 1993 did not have an element of voluntariness that applied to nonunion employees such as Plaintiffs.

Plaintiffs make an additional argument that, if the CTP was amended to allow for voluntariness, DuPont had to provide notice to its employees of the changes. Plaintiffs' argument, however, misconstrues the nature of the CTP. The CTP remained a management selection tool where management determined which employees would stay and which would be reassigned or terminated. The element of voluntariness allowed by DuPont management did not change the CTP; instead, employees could ask to participate only after management used the CTP to eliminate positions. Only after using the CTP could employees volunteer to take positions of those employees determined to be excess employees. Further, management determined whether or not the volunteer could take an excess employee's CTP package depending upon the needs of the plant and the skills of the employee. In this way, management made the ultimate decisions about who could leave DuPont.

Consequently, Plaintiffs' argument that the Magistrate Judge made an erroneous finding about the element of

volunteerism is without merit. The Court **OVERRULES** Plaintiffs' fourth objection.

5. Objection Five - "Plaintiffs Object that the Magistrate Judge Erred in Finding that Zero-Based Restructuring was Necessary. The Evidence Clearly Shows that Zero-Based Restructuring was Only a Tool to Identify the Excess Personnel.

Plaintiffs' fifth objection centers around DuPont's implementation of the zero-based restructuring tool. Plaintiffs claim that DuPont used the tool, already knowing that the tool would identify excess personnel, in order to determine which positions would be eliminated. However, as the Magistrate Judge noted, just because there were excess positions identified by the tool did not mean that Circleville would necessarily lose personnel. In fact, because Circleville has more than one line of business, excess employees could shift from one line to another and keep their jobs. Thus, the use of the zero-based restructuring did not mean that personnel would lose their jobs. Furthermore, as the Magistrate Judge noted, "as of May 19, 1993, when the results of the zero-based restructuring analysis were complete . . . , [Millikin] remained convinced that [the] CTP would not be viable for Circleville because the program, as then formulated, would decimate the ranks of younger, skilled employees." (Doc. # 105 at 27.)

Based upon the record, then, the Court concludes that zero-based restructuring was a prerequisite to any consideration of the CTP. The Magistrate Judge did not err

in making this finding. The Court **OVERRULES** Plaintiffs' fifth objection.

6. Objection Six - "The Magistrate Judge Erred in Finding that Mr. Millikin was the Sole Decisionmaker."

Plaintiffs' sixth objection argues that the Magistrate Judge's "suggestion" that Mr. Millikin was the "sole decisionmaker files in the face of Exhibit 38. . . ." (Doc. # 108 at 23.) In support of this objection, Plaintiffs list three pieces of evidence that they contend the Magistrate Judge ignored. First, Plaintiffs argue that Lynn Millikin was not the decisionmaker responsible for determining whether Circleville would participate in the CTP because Hartnagel told plant managers to "get ahead of the curve" on May 6 and May 7. Second, Plaintiffs argue that "it is also contrary to the only reasonable inference to be given to the scrapping of the attrition plan (Ex. 6) prepared by Mr. Funari on May 4, 1993. . . ." (Doc. # 108 at 23.)[2] Third, Plaintiffs contend that the Magistrate Judge reached this conclusion by "failing to lend any credence to the testimony of Robert Dillard. . . ." (Id.) These contentions fail to convince the Court that Lynn Millikin was not the sole decisionmaker for the Circleville plant.

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[2] Before the May 6 and May 7, 1993 meeting, Funari apparently prepared a plan that would account for attrition on the Mylar line. DuPont officials, such as Carroll, felt the plan was insufficient and discounted the plan in favor of novel approaches to cutting costs such as the zero-based restructuring analysis.

Instead, the Court again notes that Plaintiffs bear the burden of proving their case by a preponderance of the evidence. Plaintiffs failed to do so. Plaintiffs' contention that Hartnagel was in charge of implementing the CTP at Circleville goes against the weight of the evidence. As the Magistrate Judge noted, "the evidence is clear that there was no mandate, as of May 7, 1993, from Hartnagel or any other corporate official that Circleville implement [the] CTP; that decision could only be made by Millikin as plant manager." (Doc. # 105 at 24.)

Furthermore, this Court previously rejected Dillard's contention that the decision to implement the CTP in Circleville was made by officials in DuPont's headquarters in Wilmington. (Doc. # 77 at 32.) As noted in this Court's prior Opinion and Order, Dillard's knowledge and memory of the decision process "is limited and questionable." (Id.) Thus, Plaintiffs' attempt to bolster their argument with Dillard's testimony fails to convince this Court of the Magistrate Judge's error.

Finally, Plaintiffs' contention that the Court should infer something from "the scrapping" of the Funari attrition plan is not helpful to prove that Millikin was not the sole decisionmaker. Consequently, Plaintiffs' sixth objection is meritless; the Court **OVERRULES** Plaintiffs' sixth objection.

7. **Objection Seven - "The Magistrate Judge Erred in Her Finding that Mr. Waide Did Not Admit to Plaintiff Bradley that the Decision to Utilize the CTP had Been Finalized as of May 12, 1993."**

Plaintiffs' next objection is that the Magistrate Judge did not give enough weight to the testimony of Plaintiff Bradney and former DuPont employee Hobart Holbrook. Plaintiffs contend that Waide told both witnesses that the decision to use the CTP "was finalized on May 12, 1993." Even if true, this testimony only helps Plaintiff Bradney's claim because Plaintiff Howard retired prior to May 12. Nevertheless, the record reveals that Waide denies making the statement and that Holbrook heard Waide indicate that the timing may be incorrect. Hence, the record contains evidence that Waide did not make the statement.

Regardless of whether Waide made the statement, the evidence in the record shows that the serious consideration of the CTP occurred on May 24, 1993. Any attempts by Plaintiffs to argue that the weight of the evidence justifies another conclusion are without foundation. Again, Plaintiffs bore the burden of proving that serious consideration occurred before May 14, 1993 and they failed to meet that burden. Plaintiffs' arguments that the Magistrate Judge ignored certain pieces of evidence are without merit. Consequently, the Court **OVERRULES** Plaintiffs' seventh objection.

8. Objection Eight - "The Magistrate Judge Erred in Not Finding DuPont Liable Under Their Breach of Fiduciary Duty, Equitable Estoppel and Discrimination Claims."

This objection focuses on Plaintiffs' mistaken belief that "serious consideration" is not an element of their claims. Plaintiffs raise this objection to preserve it for the record. Nothing stated in Plaintiffs' brief convinces this Court that its prior decision (or the decision of the Magistrate Judge) that

"serious consideration" is an element of Plaintiffs' claims is in error. (Doc. # 77 at 21-22 ("regardless of the misrepresentation, there can be no breach of fiduciary duty prior to serious consideration")); see also McAuley, 165 F.3d at 1043; Muse, 103 F.3d at 494 ("misrepresentations made before serious consideration trigger no [fiduciary] duty"). Accordingly, the Court **OVERRULES** Plaintiffs' eighth objection as it pertains to their argument that "serious consideration" is not an element of their claims.

D. Challenge to the Magistrate Judge's Evidentiary Rulings

In addition to the objections challenging the rulings about timing, Plaintiffs challenge the exclusion of certain deposition testimony. In the Report and Recommendation, the Magistrate Judge stated that "Plaintiffs offered the deposition testimony of James K. Marshall, Earl Tatum, Donald Meenach, and Roger Valentine, to which Defendants have objected. Because the preferred testimony is either irrelevant to the resolution of plaintiffs' claims, or hearsay, or both, defendant[s'] objections are SUSTAINED." (Doc. # 105 at 8 n.4.) Plaintiffs' argument is that this deposition testimony "is important to corroborate live testimony at the December 1-3, 1998 trial of Plaintiff Bradney and Mr. Holbrook as to the nature of the representations made by their DuPont supervisors." (Doc. # 108 at 26.)

With respect to the testimony of Marshall, Meenach and Valentine, Plaintiffs offer no explanation as to why this testimony would be helpful to the trier of fact and only indicate that their testimony is corroborative of Plaintiff Bradney's testimony. The credibility of Plaintiff Bradney was

not squarely an issue in this matter; accordingly, the testimony fails to meet the definition of relevant evidence provided in Federal Rule of Evidence 401. See Fed. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (emphasis added)); see also United States v. Fountain, 2 F.3d 656, 667 n.6 (6th Cir. 1993) (proffered evidence must be material to the lawsuit to be relevant).

Last, the Magistrate Judge properly excluded the testimony of Earl Tatum, Hartnagel's former boss. Tatum testified that he did not have any personal knowledge of any use of the CTP within DuPont Films. (Tatum Dep. at 99.) Accordingly, his testimony was not relevant under Federal Rule of Evidence 401. See Fed. R. Evid. 401. As such, the Court **OVERRULES** Plaintiffs' objections to the Magistrate Judge's evidentiary rulings.

IV. CONCLUSION

Upon consideration and being duly advised, the Court **OVERRULES** all of Plaintiffs' objections to the Magistrate Judge's Report and Recommendation of March 22, 1999. Following a de novo review of the record, the Court finds that the Magistrate Judge accurately set forth the record in making her findings of fact in this case and made the appropriate conclusions of law. The Court hereby **ADOPTS** the Report and Recommendation and **ORDERS** the Clerk of Courts to enter **JUDGMENT** in favor of Defendants and against Plaintiffs on all three of Plaintiffs' claims. This case is **TERMINATED.**

IT IS SO ORDERED.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed May 6, 1998]

Nos. C-2-94-1264
C-2-94-1265

JACKIE L. BRADNEY, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
E.I. DU PONT DE NEMOURS	)
AND COMPANY, PENSION	)
FUND RETIREMENT PLAN,	)
et al.,	)
Defendants.	)
	)

OPINION AND ORDER

This matter is before the Court on a renewed motion for summary judgment[1] by the Defendants (collectively

[1] The Court denied DuPont's original motion for summary judgment pursuant to Federal Rule of Civil Procedure Rule 56(f) to permit Plaintiffs time to depose two DuPont officials. (See C-2-

"DuPont"). Plaintiffs are retirees of DuPont who allege that DuPont violated the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1994), by misleading Plaintiffs about the status of DuPont's decision-making process to implement an employee benefit plan at the plant where Plaintiffs worked. Plaintiffs claim that as a result of DuPont's misrepresentations, they retired just prior to the implementation of the benefit plan and were denied benefits for which they would have been eligible had they not retired. Plaintiffs claim that DuPont breached its fiduciary duties under ERISA and engaged in discrimination prohibited by ERISA. Plaintiffs seek compensatory and equitable relief.

DuPont asserts that its predictions that no retirement incentive would be offered at the plant are not actionable unless DuPont was seriously considering implementing the plan at the time the representations were made. According to DuPont, Lynn Milliken, the plant manager, had the authority to decide whether to implement the plan at the plant. DuPont claims that Milliken did not seriously consider implementing the plan at the plant until after all of the Plaintiffs had retired. Therefore, DuPont argues that it did not breach its fiduciary duties under ERISA.

1264, Doc. # 67 (All references to the record in this consolidated case shall be to the record of case number C-2-94-1264 unless otherwise indicated. The Court shall indicate references to the docket in case number C-2-94-1265 as "94-1265, Doc. #").) The Court granted Dupont leave to renew its motion. This matter is currently before the Court on DuPont's renewed motion. (Doc. # 70.)

The Court concludes that there is no genuine issue of material fact that DuPont did not seriously consider implementing the plan prior to May 6, 1993. Only two of the six Plaintiffs, Jack Bradney and John Howard, retired after that date. Therefore, the Court **DENIES** DuPont's motion as it relates to them. The Court **GRANTS** DuPont's motion as it relates to the other four Plaintiffs and **DISMISSES** those four from this action.

I. STATEMENT OF FACTS[2]

This case arises out of the actions taken by DuPont in the early 1990s to reduce its costs. The central issue is when did DuPont first seriously consider implementing a benefit plan at the plant where Plaintiffs worked. As will be discussed more fully below, if DuPont seriously considered implementing the benefit plan prior to the Plaintiffs' respective retirement dates, then DuPont could be liable under ERISA.

A. Overview of Plaintiffs' Claim

Plaintiffs are six former employees of DuPont's plant in Circleville, Ohio ("the Circleville plant"). They all worked there for over thirty-three years. In the spring of 1993,

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[2] The following statement of facts is based primarily on uncontroverted facts established by the evidence in the record.

Plaintiffs retired from the Circleville plant on different dates from March 31 to May 14.[3]

Prior to their retirement, Plaintiffs attended various plant meetings where retirement incentives, among other things, were discussed. At the times DuPont was pursuing a joint venture with Teijin, a Japanese company. Plant management officials told the Plaintiffs that the Circleville plant would not offer any early retirement incentives during the hiring phase of the joint venture. Some of the Plaintiffs followed up these meetings with individual conversations with the officials. Again, plant officials told Plaintiffs that the Circleville plant would not offer any early retirement incentives while it was in the hiring mode.

In June 1993, while still in the hiring mode for the Teijin joint venture, the Circleville Plant announced that it would implement a severance plan known as the Career Transition Plan (the "CTP"). DuPont concedes that Plaintiffs would have been eligible to participate in the CTP but for the timing of their retirements. (See Doc. # 46 at 17.) Under the CTP, Plaintiffs would have received approximately one year's salary as a lump sum pay out. Plaintiffs characterize this pay out as a retirement incentive and claim that DuPont breached ERISA. There is no dispute that the CTP is an ERISA plan or that DuPont is subject to ERISA.

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[3] Don Meenach retired on March 31, 1993. James Marshall retired on April 26, 1993. Hobart Holbrook and Roger Valentine retired on April 30, 1993. John Howard retired on May 10, 1993 and Jack Bradney retired on May 14, 1993.

B. Economic Environment and Cost Cutting Measures Leading Up to the Implementation of the CTP

During the early 1990s, economic realities forced DuPont to undergo significant cost reductions. On July 25, 1991, DuPont's chief executive officer announced that the company had to reduce costs by one billion dollars in order to make the company more competitive. (See Depo. Exs. 12.) As part of the plan to reduce costs, DuPont planned to reduce the number of its employees on a corporate-wide level.

In order to help reduce the number of employees, DuPont used voluntary early retirement programs known as the Voluntary Retirement Incentive ("VRI") and the Voluntary Separation Program ("VSP"). (See Doc. # 39, Ex. 3 at ¶ 20 (hereinafter "Carroll Aff.").) Local plants had the authority to decide whether to participate in a VRI or VSP based upon the business needs and the business judgment of each plant.

Although other DuPont plants had exercised their discretion in 1990 and 1991 to participate in the VRI and VSP plans as a way of cutting labor costs, the Circleville plant had not done so. (See Doc. # 39, Ex. 1, Milliken Aff. at ¶ 9 (hereinafter "Milliken Aff.").) The Circleville plant met its business needs during this period using other cost control devices. (Id. at ¶ 7.)

C. The Benefit Plan

The VRI and VSP were attractive to employees, but did little to decrease short term costs and resulted in the irretrievable loss of key employees' skills and experience. As

a result, in October of 1992, DuPont introduced the CTP a new corporate-wide severance plan.

Unlike the plans it replaced, the CTP is an involuntary severance plan. Plant management selects employees for participation in the CTP. By allowing management to select excess employees to participate in the plan, the CTP gives the plant control over the employees and their respective skills that would be lost through early retirement. The CTP is the plan upon which this dispute is focused.

The CTP emphasizes redeployment, retraining, career counseling and other job transition and job search services. The CTP is designed to redeploy excess personnel to another position within DuPont, or, if necessary, to help excess personnel find work outside of DuPont. In addition to training and placement services, the CTP affords employees separated from DuPont certain financial benefits known as Career Transition Financial Assistance ("CFTA"). Plaintiffs claim they were denied CFTA benefits -- which for Plaintiffs would have amounted to approximately one year's salary -- as a result of DuPont's misconduct.

To select employees for participation in the CTP, Circleville management used a process known as the Reconciliation Selection Process ("RSP"). This process provided automatic protection for two key personnel resources: (1) anyone with skills deemed critical, and (2) anyone with twenty-five years or more of service. The RSP selection mechanism generally involves the following steps: (1) assemble a management team to determine critical skills; (2) determine the new organization structure; (3) gather data regarding employees; (4) fill jobs in the new organization as

follows: (a) critical skills employees are retained; (b) employees with twenty-five years of more service are retained for any job they are qualified to fill; (c) employees with less than three years are considered excess; (d) employees with demonstrated outstanding performance will be retained for any job for which they are qualified; (e) fill remaining jobs by seniority on a last-in-first-out ("LIFO") basis. (See Carroll Aff. at 6.) The RSP method was used to determine excess employees for the CTP.

D. Decision-making Structure of DuPont

DuPont is organized into semi-autonomous units called "strategic business units" or "SBUs". The Circleville plant is part of the SBU called DuPont "Films." In the decision-making structure of DuPont, the locus of accountability is the SBUs.

SBUs have, however, delegated much of their decision-making authority to their constituent businesses and plants. As a result, businesses and plants are often accountable to DuPont for meeting certain financial commitments within the DuPont structure.

The Circleville plant, like all DuPont Films operations, has a great deal of independence to make its own business decisions. Circleville's plant manager at the time in question, Lynn Milliken, was responsible for ensuring that Circleville met its financial commitments to DuPont. Accordingly, Milliken and the local Circleville management had the authority to decide how to meet the plant's financial commitments. (Milliken Aff. at ¶ 6; see also Doc. # 39, Ex.

2, Hartnagel Aff. at ¶¶ 4-5 (hereinafter "Hartnagel Aff.") and Ex. 3, at 19 (hereinafter "Waide Aff.").)

Beginning on January 1, 1993, the CTP was available to Milliken and the Circleville plant management as a corporate cost-cutting tool that could be implemented at the Circleville plant. DuPont asserts that Milliken ultimately made the decision to implement the CTP at the Circleville plant.

E. Statements by DuPont Officials Before Plaintiffs' Retirement

In early 1993, cost-cutting rumors, including the rumor that the plant was considering implementing the CTP, spread throughout the Circleville plant. At various plant meetings, Plaintiffs asked Lynn Milliken and other plant officials about the possibility of the Circleville plant offering a retirement incentive. The officials told them that the plant would not offer a retirement incentive because it didn't make business sense to offer a retirement incentive while the plant was hiring for the joint venture with Teijin.[4] Based on these representations and others made in response to individual inquiries, Plaintiffs retired on various dates in the spring of 1993.

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[4] Plaintiffs assert in their briefs, that DuPont officials told them "that Circleville would never offer an early retirement incentive or CTP as long as it was in the hiring mode, specifically for a new plant in Circleville as part of a joint venture with Teijin." (Doc. # 39 at 5.) The Court finds no evidence in the record that the DuPont officials used the word "never."

F. Decision to Implement the CTP[5]

The head of DuPont Films, the plant managers and business leaders comprised DuPont Films' Strategic Leadership Team (the "Team"). The Strategic Leadership Team held a quarterly meeting on May 6-7, 1993. The topic for the meeting was DuPont Films' financial under-performance in the first quarter of 1993.

The Team devoted much of the May 6-7 meeting to generating a list of twenty-eight concepts, including the CTP, aimed at reducing costs and generating revenues. (See Depo. Ex. 38; Caroll Aff. at ¶ 9.) The Team then divided into four subgroups (Group I, Group II etc.) which were to analyze the concepts and recommend the best option.

Group I scheduled its first meeting on May 12-13 in Baltimore, Maryland. The purpose of Group I's first meeting was to discuss the eleven concepts, including the CTP, that had been assigned to it. At the meeting, Group I decided to implement the process of zero-based restructuring.

Zero-based restructuring is a process by which excess costs are identified in an organization. First, all of the tasks necessary to run an organization are identified. Those tasks are then translated into job positions and those positions are then used to form a new organizational structure. Employees

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[5] The following is DuPont's account of the process by which it made the decision to implement the CTP. Plaintiffs contest this account and the disputed issues are resolved in the Analysis section below.

are then placed within the new structure. The goal of zero-based restructuring is to identify any excess personnel if they exist.

The Team also discussed the CTP at Group I's May 12-13 meeting. According to DuPont, the CTP, like any cost-cutting measure, could not be considered until the results of the zero-based restructuring were in.

On May 14, 1993, Milliken introduced the concept of zero-based restructuring to the leadership at the Circleville plant. Over the next five days the process was carried out at the Circleville plant. DuPont asserts that until the zero-based restructuring process was finished, Milliken did not know whether or how much of his personnel were excess.

On May 18, 1993, the Site Leadership Team for the Circleville Plant completed Circleville's tentative zero-based restructuring charts. Milliken reviewed these charts and forwarded them on to Ben Waide, the Director of Operations of DuPont Films. Milliken expressed to Waide his concern that the management selection mechanism operated on a LIFO basis and automatically excluded senior employees. Milliken's concern was that this mechanism required termination of experienced junior employees whose loss might "mortgage the future" of Circleville.

On May 19, 1993, as a result of Milliken's concerns, Ben Waide contacted the Human Resources Manager for DuPont Films, seeking clarification as to whether the RSP selection process could operate on a voluntary basis so as to protect younger employees and to allow older employees who wanted to retire to participate in any reduction. The Human

Resources Manager agreed to investigate the matter but confirmed that as written, the CTP had no such flexibility.

The Human Resources Manager confirmed his understanding with a Human Resources Supervisor that the CTP could not operate on a voluntary basis. A proposal was developed that left intact the involuntariness of the CTP, as well as the RSP management selection process, but accommodated senior employees' expressions of interest in early retirement after completion of the RSP management selection process. The proposal maintained that after the pool of potentially excess employees – junior employees (exclusive of high performance) on a LIFO basis – was determined, management would be permitted to consider senior employees' expressions of interest to be selected for substitution for a similarly situated qualified junior employee. Corporate approval was required for the proposal because it would cost the corporation more than would the CTP without the modification.

On May 24, 1993, the proposal was approved. On that day, Group I was meeting in Wilmington, Delaware to continue work from its earlier meeting. The members of Group I were informed that the CTP would be modified to allow management to select senior employees in the CTP. The plant managers immediately adjourned the meeting in order to contact their site leadership and inform them of this proposal.

Milliken contacted Greg Funari, an Operations Manager at the Circleville plant, and instructed him to contact employees with imminent retirement dates and inform them of the proposal that might impact their retirement. Two

employees at the plant delayed their retirements and both were ultimately selected to participate in the CTP.

On June 8, 1993, the Team decided to use the CTP within DuPont Films. The local plants within DuPont Films still had authority to decide whether to implement the CTP at the plant. According to DuPont, after the June 8 Team meeting, Milliken decided to implement the CTP at the Circleville plant. A refined zero-based restructuring analysis indicated that it was necessary to reduce thirty-one positions at the site. In the end, senior employees who expressed a desire to retire were selected for all of these positions.

II. SUMMARY JUDGMENT STANDARD

In reviewing a motion for summary judgment, the Court must determine whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Massey v. Exxon Corp., 942 F.2d 340, 342 (6th Cir. 1991). Summary judgment is inappropriate if there is a genuine issue of material fact for trial. See Middleton v. Reynolds Metals, 963 F.2d 881, 882 (6th Cir. 1992). An issue is "genuine" provided that there is more than a "mere scintilla of evidence" in support of the nonmoving party's position; "there must be evidence on which the jury could reasonably find for the [nonmoving party]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is material if it will "affect the outcome of the suit under the governing law. . . . Factual disputes that are irrelevant or unnecessary will not be counted." Liberty Lobby, 477 U.S. at 248. In deciding whether a genuine issue of material fact exists, the court must view the evidence in a light most

favorable to the nonmoving party and draw all justifiable inferences in his favor. See id. at 255.

The moving party bears the burden of establishing the absence of a genuine issue as to any material fact. See Adikes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). The nonmoving party does have the burden, however, after completion of sufficient discovery, to submit evidence in support of any material element of a claim or defense on which that party would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of that material fact. See Celotex Corp., 477 U.S. at 322. If the nonmoving party presents evidence that is "merely colorable" or "not significantly probative," then summary judgment must be granted. See Anderson, 477 U.S. at 249-50. It is with these standards in mind that the instant motion must be decided.

III. ANALYSIS

The Court analyzes DuPont's motion for summary judgment and the Plaintiffs' opposition to that motion in three steps. In the first and most significant step, the Court considers the parties' arguments relating to Plaintiffs' claim that DuPont breached its fiduciary duties under ERISA. Second, the Court considers the parties' arguments relating to the Plaintiffs' claim that DuPont engaged in discrimination prohibited by ERISA. Last, the Court considers Plaintiffs' argument that DuPont failed to address its equitable estoppel claim. Again, at the heart of all of these arguments and claims is the central issue of when DuPont first seriously considered implementing the CTP at the Circleville plant.

A. FIDUCIARY DUTY

The parties agree that, if DuPont officials told Plaintiffs that DuPont would not implement the CTP at a time when DuPont was seriously considering implementing the CTP, DuPont breached its fiduciary duty to Plaintiffs. Plaintiffs argue in favor of the broader principle that serious consideration, while sufficient, is not a necessary condition for DuPont to breach its fiduciary duty. The Court rejects this broader principle. Next, the Court rejects Plaintiffs' argument that the issue of serious consideration cannot be decided on summary judgment because it is a factual issue. Last, the Court considers the issue of when serious consideration first occurred.

1. Role of Serious Consideration

The parties dispute the law controlling the Court's decision in this case. At the heart of their disagreement is whether employers can breach their fiduciary duties under ERISA by misrepresenting to employees the status of an employee benefit plan before the employer seriously considers implementing the plan. DuPont asserts that prior to seriously considering the implementation of an employee benefit plan, an employer cannot make a misrepresentation regarding the implementation of the benefit plan, and so, the employer cannot breach its fiduciary duties with regard to the plan. Plaintiffs assert that employers can make a misrepresentation and can breach its fiduciary duties even before the employer seriously considers implementing the plan. The Court agrees with DuPont.

ERISA imposes certain obligations on plan fiduciaries for the benefit of plan participants. See 29 U.S.C. § 1104(a)(1). Specifically, ERISA provides in relevant part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and - -
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . .

29 U.S.C. § 1104(a)(1). Thus, ERISA imposes on each fiduciary a duty of loyalty to "act solely in the interests of the plan's participants and beneficiaries" and a duty of care to act with "the care, skill, prudence and diligence" of a prudent man.

"Under ERISA, purely business decisions by an ERISA employer are not governed by section 1104's fiduciary standards." Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1163 (6th Cir. 1988). As part of the "business decisions" exclusion, employers owe no fiduciary duty to their employees when deciding whether to adopt, modify, implement or terminate an employee benefit plan. See Muse v. IBM Corp., 103 F.3d 490, 493 (6th Cir. 1996); Drennan

v. General Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992); Berlin, 858 F.2d at 1163.

An exception to the business decisions exclusion exists for certain communications by an employer. In particular, once an employer gives serious consideration to implementing an employee benefit plan, the employer has a fiduciary duty of loyalty not to make material misrepresentations to potential plan participants. See Berlin, 858 F.2d at 1163-64; Muse, 103 F.3d at 494. "[M]isrepresentations made before serious consideration, [however] trigger no such duty." Muse 103 F.3d at 494.

The duty to avoid misrepresentations does not require the employer to predict an ultimate decision to offer a plan so long as the employer fairly discloses the progress of its serious considerations to make a plan available to affected employees. Drennan 977 F.2d at 251. The employer does not have a "'duty of clairvoyance;' i.e., to predict accurately the future availability of benefits." Berlin, 858 F.2d at 1164. As the Sixth Circuit noted,

> Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that "employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended." H.R.Rep. No. 533, 93d Cong., 2d Sess. VI (1974), reprinted in 1974 U.S.C.C.A.N. 4639. Insisting on disclosure during the formulation of a plan and prior to its adoption would increase the likelihood of confusion on the part

> of beneficiaries. At the same time management would be unduly burdened by the continued uncertainty of what to disclose and when to disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals.

Muse, 103 F.2d at 494; Swinney v. General Motors Corp., 46 F.3d 512, 520 (6th Cir. 1995) ("an employer should not be forever deterred from giving its employees a better deal merely because it did not clearly indicate to a previous employee that a better deal might one day be proposed."). Thus, an employer has no fiduciary duty to disclose until it first seriously considers implementing a benefit plan.

From the above statement of the law, it is apparent that Plaintiffs are incorrect in their assertion that serious consideration is not necessary for a breach of a fiduciary duty under ERISA. Serious consideration of an employee benefit plan triggers an employer's fiduciary duty not to make misstatements regarding the implementation of the plan; because there is no duty prior to serious consideration, there can be no breach of duty prior to serious consideration.[6]

Plaintiffs seek to distinguish this case from Berlin and its progeny. (See Doc. # 44 at 34-39.) Plaintiffs argue that those cases involved situations where serious consideration

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[6] Plaintiffs appear to acknowledge this interpretation of Muse. (See Doc. # 71 at 7) ("[I]n Muse, the 'serious consideration' and consequent fiduciary responsibilities arose on the date the employer began negotiations to sell a particular plant.") (emphasis added).)

was important to deciding whether there was a misrepresentation and whether the misrepresentation was material. Here, the Plaintiffs argue, DuPont made absolute statements that the CTP would never be implemented. Specifically, Plaintiffs argue that DuPont officials told them that the CTP would "never" be offered at the Circleville plant so long as the Plant was hiring for the Teijin joint venture. Plaintiffs argue that given the unconditional nature of DuPont's statements, serious consideration of the CTP is irrelevant to a determination that such statements were material misrepresentations. The Court is unpersuaded.

First, Plaintiffs fail to establish that DuPont officials ever used the word "never" or its equivalent in their statements to Plaintiffs. (See Doc. # 44 at 5.) Even if DuPont officials made the absolute statements in question, the problem with Plaintiffs distinction is that under the Berlin rule, an employer has no ERISA duty to breach until after the employer seriously considers implementing the employee benefit plan. Prior to seriously considering the CTP, DuPont could not breach the duty of disclosure imposed by ERISA because ERISA imposed no duty on DuPont to disclose at that time. Thus, the distinction between an absolute statement and a predictive statement is without a difference to the determination of whether DuPont violated its fiduciary duties under ERISA. In short, regardless of the misrepresentation, there can be no breach of fiduciary duty prior to serious consideration.

Plaintiffs also bring to the Court's attention the Second Circuit case styled Ballone v. Eastman Kodak Co., 109 F.3d 117 (2d Cir. 1997). Plaintiffs assert that Ballone is "on all fours" with this case and that this Court should follow Ballone

in ruling on DuPont's motion for summary judgment. (See Doc. # 61 at 1.) The Court finds the Ballone case inapposite here because the court in Ballone expressly rejects the Berlin rule applicable to this case.

In a Ballone, the Second Circuit reversed the district court's holding that "serious consideration of a future plan is a prerequisite to liability for misstatements regarding the availability of future pension benefits." Id. at 123. The district court relied on two cases for its holding: (1) Mullins v. Pfizer, Inc., 23 F.3d 663 (2d Cir. 1994), and (2) the Berlin case. See id. The Ballone Court acknowledges that in Mullins, the Second Circuit followed portions of the Berlin decision. See id. The Second Circuit "did not, however, hold [in Mullins] that future changes [to an employee benefit plan] must be under serious consideration before an employer may be liable for affirmative misstatements regarding those changes." id. at 123. Thus, the Second Circuit expressly rejected the Berlin rule and the rule of the Sixth Circuit. This Court is, of course, bound to follow Sixth Circuit precedent when Sixth Circuit precedent applies. The Berlin rule applies to this case. Thus, in ruling on this case, this Court disregards Ballone.

Finally, Plaintiffs also argue that the Muse case is distinguishable for two reasons. First, according to Plaintiffs, Muse involved the creation of a new or amended ERISA benefit program. (See Doc. # 71 at 5.) Plaintiffs assert that in this case, the CTP was in place as of January 1, 1993, and did not need to be created or amended. Second, Plaintiffs argue that Muse involved an employer who had more than one cost-control mechanism available to it. In contrast, the CTP was the only tool available to DuPont for involuntary work

force reductions. After careful consideration, the Court concludes these differences are not significant and do not provide a legitimate basis for distinguishing Muse.

First, although CTP was adopted by DuPont as a corporate tool for controlling costs, there is no dispute that a decision to implement the CTP at the Circleville plant was necessary before the Plaintiffs would be eligible for it. In this respect, the CTP was the type of contingent or prospective plan to which the Berlin rule applies. See Drennan, 977 F.2d at 251. Second, the fact that the CTP is the only corporate tool available for an involuntary work force reduction is without a difference in the analysis of the Berlin rule.

2. The Propriety of Summary Judgment

Plaintiffs argue that summary judgment is inappropriate because the question of when serious consideration occurred is a question of fact that must be decided at trial. The Court agrees that the question of when serious consideration occurred is a question of fact; indeed, it is a material fact in this case. See Drennan, 977 F.2d at 251. However, summary judgment is still appropriate if, from the documentary evidence, there is no genuine issue about when serious consideration occurred. See Fed. R. Civ. P. 56(c). None of the cases cited by the Plaintiffs hold otherwise. See Fischer v. Philadelphia Elec. Co., 994 F.2d 130, 135 (3d Cir. 1994); Drennan, 977 F.2d at 251; Berlin, 858 F.2d at 1164.

3. The Measuring Date for Determining Whether DuPont Breached Its Fiduciary Duty

The central question in this case is when did DuPont first seriously consider implementing the CTP at the Circleville plant. Prior to serious consideration, DuPont could not have breached its fiduciary duty when it told Plaintiffs that the CTP would not be offered at the Circleville Plant.

The Court concludes that each Plaintiff's retirement date is the appropriate day on which to determine whether DuPont breached its fiduciary duty to that Plaintiff. Some of the Plaintiffs inquired about the CTP up until the date of their retirement and DuPont officials told them that no retirement incentives would be offered at the Circleville plant. Thus, if DuPont was seriously considering implementing the CTP on the day these Plaintiffs retired, DuPont breached its fiduciary duty to them on that day. As for those Plaintiffs who did not ask about the CTP or were not told that the CTP would not be offered up until the date of their retirement, the Court concludes that their retirement date is still the appropriate date on which to determine whether DuPont violated its fiduciary duty to them. Each Plaintiff had the ability to change his mind about retirement up until his retirement date. In addition, as noted above, DuPont had a duty to fairly disclose the progress of its serious considerations to make a plan available to affected employees. See Drennan 977 F.2d at 251. Together, these points required DuPont to disclose that it was seriously considering implementing the CTP, if indeed it was seriously considering the CTP, up until the date each Plaintiff retired. In other words, DuPont was obligated to

correct its past predictions that the Circleville plant would not offer retirement incentive once the validity of those predictions was undermined by serious consideration of a retirement incentive. Therefore, the Court concludes that the last date on which DuPont could have breached its fiduciary duty to each of the Plaintiffs is each Plaintiffs' respective retirement date. If DuPont was seriously considering implementing the CTP at the Circleville Plant on the Plaintiffs' respective retirement dates, DuPont breached its fiduciary duty to that Plaintiff.

4. DuPont's Affidavits and the Authority to Decide Whether to Implement the CTP

Plaintiffs set forth three attacks against the affidavits DuPont submits in support of its motion for summary judgment. For the most part, these attacks fail. One attack worthy of discussion, however, involves an apparent inconsistency in DuPont's evidence on who had the authority to decide whether to implement the CTP at the Circleville Plant. The Court shall briefly address Plaintiffs' other arguments and then discuss the issue relating to the authority to implement the CTP in some detail.

In their first attack on DuPont's affidavits, Plaintiffs' assert that DuPont "suppl[ies] affidavit after affidavit making blanket conclusory statements that serious consideration occurred on certain dates, and didn't occur on others." (Doc. # 44 at 43.) The Court agrees with Plaintiffs that DuPont's affidavits do contain some conclusory assertions with respect to the issue of serious consideration. (See. e.g., Milliken Aff. at ¶ 10.) Nevertheless, the majority of the affidavits provide details to help support those assertions. (See. e.g., id.) The

Court shall take into consideration the conclusory nature of any assertions made in those affidavits when deciding whether a genuine issue of fact exists.[7] The Court, however, will not disregard or strike the affidavits as result of these conclusory statements.

In their second attack on DuPont's affidavits, Plaintiffs argue that there are numerous other inconsistencies in DuPont's affidavits and its evidence. (See id. at 44-47.) Plaintiffs conclude that the affidavits may not be used to properly support Defendant's motion for summary judgment. After reviewing the evidence in question, the Court concludes that the majority of Plaintiffs' attacks on DuPont's evidence fail. (Doc. # 44 at 44-47.) With one exception discussed below, the inconsistencies alleged by Plaintiffs either do not exist or do not matter in the analysis of this case.

In their last attack on DuPont's affidavits, Plaintiffs assert that the portions of DuPont's affidavits, tending to show that the decision to implement the CTP was a local decision, are contradicted by DuPont's witnesses and other documents. (See id. at 44.) Specifically, Plaintiffs assert that the affidavit of Lynn Milliken, the Circleville plant manager at the time in question, is contradicted by DuPont's own evidence. According to Plaintiffs, the testimony of Circleville plant officials Greg Funari and John Dillard contradicts Milliken's affidavit testimony. The Court disagrees that

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[7] The Court notes that many of these conclusory assertions take the form of topic sentences for paragraphs. The paragraphs, in good stylistic form, tend to support the topic sentence. While the conclusory sentences alone would be inadequate for summary judgment, the paragraphs as a whole are not.

Funari's testimony contradicts Milliken's affidavit. Indeed, Funari's testimony tends to show that the decision to implement the CTP was local to the Circleville plant. The Court concludes that while Dillard's testimony may contradict Milliken's affidavit, the contradiction is insignificant in the analysis of DuPont's motion for summary judgment.

In his affidavit, Milliken states that he decided to implement the CTP and that he never felt any mandate from superiors to implement the CTP. (See Milliken Aff. at ¶ 6; see also Hartnagel Aff. at ¶¶ 4-5; Waide Aff. at ¶ 19.) Plaintiffs cite certain portions of Funari's deposition testimony in support of their attack on Milliken's claim that he made the decision to implement the CTP. (See Doc. # 44 at 44.) In his testimony, however, Funari states that Milliken called him from a Strategic Leadership Team meeting in Wilmington on May 18, 1993 and told him that Circleville had to eliminate a portion of costs on an accelerated time schedule. The total excess costs were equivalent to twenty-eight to thirty-one positions. (Funari Depo. at 55.) Funari testified that this was the first time Circleville management knew that the necessary cost-cutting could not be handled through normal attrition and this would "force us to entertain a CTP." (Funari Depo. at 55-56.) This last statement tends to show that the decision to implement the CTP was local. Moreover, Funari's testimony that the Strategic Leadership Team in Wilmington rejected the Circleville plant's plan for reducing costs, (Funari Depo. at 105-06), does not show that the Strategic Leadership Team made the decision to implement the CTP at the Circleville plant. Rather, it shows what DuPont apparently concedes: that the corporate business goals of DuPont were imposed from the SBUs onto the plants. This does not contradict

DuPont's evidence that the decision on how to meet those goals was local to the plants.

Nonetheless, the affidavit of Lynn Milliken and the deposition testimony of John Dillard are inconsistent as to the locus of the decision to implement the CTP. Dillard testified that in the latter half of May 1993, "Wilmington" informed Circleville of the decision to use the CTP. (See Dillard Depo. at 31.) According to Dillard, "Wilimington" reviewed the cost projections at Circleville, determined that natural attrition would not bring Circleville's costs down fast enough, and decided that the CTP would be used to bring those costs in line more quickly. (Id. at 57.)

DuPont asserts that there is no inconsistency between this testimony and Milliken's affidavit because Milliken has more knowledge than Dillard about the locus of the decision to implement the CTP. Although DuPont's theory is a plausible explanation for the inconsistency in this evidence, it is does not dispel the inconsistency. The inconsistency creates a question of material fact about who decided to implement the CTP at the Circleville plant. Therefore, the Court must decide whether this inconsistent evidence is sufficient to create a genuine issue of material fact. The Court concludes that it does not.

In order to create a genuine issue of fact for trial, the nonmoving party must provide more than a mere scintilla of evidence in support of its position; there must be evidence on which a jury could reasonably find for the nonmoving party. Anderson, 477 U.S. at 252. Dillard's testimony is not sufficient to create a genuine issue of material fact for five reasons. First, it is important to note the limited scope of the

inconsistency created by Dillard's testimony. Dillard's testimony and Milliken's affidavit are consistent in all respects except with respect to whether someone other than Milliken made the decision to implement the CTP. Second, the Court concludes, and Dillard admits, that his knowledge and memory of the decision process is limited and questionable. (Dillard Depo. at 29, 31, 37.) Third, at the time in question, Dillard was the Business Services and Supply Chain Manager who reported to Milliken. (Dillard Depo. at 8.) Dillard was not a member of the Strategic Leadership Team but he was a member of the Site Leadership Team at Circleville. Plaintiffs assert that, as a member of the Site Leadership Team, Dillard would have been involved in making the decision to implement the CTP if the decision had been local. Plaintiffs, however, provide no evidence for the assertion that Circleville's Site Leadership Team made the decision to implement the CTP. DuPont on the other hand presents evidence that Lynn Milliken, who led the Site Leadership Team, had the authority to make the decision and, in fact, made the decision to implement the CTP. (Milliken Aff. at ¶ 6; see also Hartnagel Aff. at ¶¶ 4-5; Waide Aff. at 19.) Therefore, even if Dillard did not participate in making the decision to implement the CTP, the decision could still have been local. Fourth, Dillard's testimony is vague. Contrary to Plaintiffs' contention that Dillard testified that corporate headquarters in Wilmington made the decision, Dillard only testifies that the decision came from "Wilmington" in late May. Dillard mentions no particular meeting, or decision-making entity. Finally, Dillard's vague testimony stands alone. Plaintiffs provide no other evidence, theory or support for the proposition that someone other than Milliken made the decision to implement the CTP at the Circleville plant. DuPont, on the other hand, has provided substantial evidence

to support its detailed explanation of the decision-making process. For all the reasons stated above, the Court concludes that Plaintiffs fail to present more than a mere scintilla of evidence to show that the decision to implement the CTO at the Circleville was not local to the plant. Accordingly, the Court concludes that there is no genuine issue for trial as to whether the decision to implement the CTP was local or not.

5. When Did Serious Consideration Occur?

In this section the Court discusses the parties arguments concerning when serious consideration occurred. The Sixth Circuit provides some guidance in determining when an employer seriously considers implementing an employee benefit plan in Muse, 103 F.3d at 494. According to the Court in Muse, an employer seriously considers a plan when the employer focuses on a particular plan for a particular purpose. See id. An employer does not seriously consider a plan if the employer merely studies the possibility of a plan in order to gain a general appreciation of its options. See id. For example, in Muse, the Court held that a specific event, the sale of IBM's Lexington plant, triggered the offering of the plan at issue. See id. The Muse court stated that "[a]lthough the sale had been contemplated earlier along with other options for the Lexington plant, it was not until IBM made a definite decision to sell the Lexington plant and was told by the buyer that further downsizing was necessary that IBM focused on this particular plan for this particular

purpose." Id. Prior to that time, IBM had merely considered the plan in a general investigation of its options.[8]

The Court concludes that DuPont satisfies its initial burden on summary judgment of demonstrating the absence of a genuine issue of material fact that DuPont did not seriously considered implementing the CTP at the Circleville Plant prior to May 1993. DuPont supports its argument with acceptable documentary evidence and its argument is internally coherent. The Court rejects Plaintiffs' attempts to demonstrate a genuine issue of material fact that serious consideration occurred prior to the May 6-7 meeting of the Strategic Leadership Team. Finally the Court concludes that there is a genuine issue of material fact with respect to whether DuPont seriously considered implementing the CTP at the Circleville Plant prior to the retirement date of Plaintiffs Bradney and Howard.

a. DuPont's Theory on When Serious Consideration Occurred

DuPont asserts that it did not first seriously consider implementing the CTP at the Circleville Plant until May 24, 1993, at the earliest. The last Plaintiff to retire was Bradney,

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[8] The Third Circuit also provides further guidance on the concept of serious consideration. According to the Third Circuit analysis serious consideration occurs when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change. Fischer v. Philadelphia Elec. Co., 96 F.3d 1533 (3d Cir. 1996). The determination is fact specific and the three factors coalesce to form a composite picture.

who retired on May 14, 1993. Therefore, DuPont did not breach its fiduciary duty to any of the Plaintiffs.

To support this theory, DuPont presents substantial evidence that up until May 24, 1993, DuPont was simply gathering information and weighing its alternatives. DuPont asserts that zero-based restructuring was a necessary condition to implementing any cost-cutting measure. According to DuPont, Circleville did not know how many excess employees, if any, it had until the zero-based restructuring analysis was completed. The Circleville site leaders did not begin the zero-based restructuring analysis until May 14 or 15. Therefore, argues DuPont, no serious consideration could have occurred until after those dates.

Next, DuPont points out that Milliken was concerned by the first drafts of Circleville's zero-based organizational charts, which were completed May 19. In particular, Milliken was concerned that the RSP mechanism required termination of experienced junior employees whose loss might "mortgage the future" of Circleville. Thus, until there was corporate approval of the proposal allowing Circleville management to consider senior employees' expressions of interest in being substituted for a similarly situated qualified junior employee, DuPont asserts that it could not have seriously considered implementing the CTP at the Circleville Plant. Corporate approval of the proposal occurred on May 24, 1993. Therefore, DuPont asserts, serious consideration could not have occurred until May 24, 1993.

The Court notes that Funari's testimony, discussed above, contradicts DuPont's theory to some degree. Funari testified that Circleville management was "forced to entertain"

the CTP when the Strategic Leadership Team told Milliken on May 18, 1993, that Circleville had to eliminate a portion of costs equivalent to twenty-eight to thirty-one positions on an accelerated time schedule. (Funari Depo. at 55, 105-06.) Funari testified that this was the first time Circleville management knew that the necessary cost-cutting could not be handled through normal attrition. From this evidence, one could reasonably conclude that DuPont first seriously considered the CTP on May 18, 1993 for the purpose of achieving the corporate business goals defined for Circleville by the Strategic Leadership Team. Even if this conclusion is true, it does not preclude DuPont's motion for summary judgment because May 18 is four days after the date that the last Plaintiff (Bradney) retired. Nonetheless, this evidence does diminish DuPont's theory of when serious consideration occurred.

b. Plaintiffs' Theory on When Serious Consideration Occurred

Plaintiffs' do not give any definitive date as the day that DuPont first seriously considered the CTP for the Circleville plant. Instead, Plaintiffs present a number of arguments to show that, based on the evidence, it may be inferred that DuPont seriously considered the CTP prior to the Plaintiffs' retirement dates. First, Plaintiffs argue that Ben Waide admitted during a meeting with Plaintiffs Bradney and Holbrook that DuPont made the final decision on CTP on May 12, 1993. Plaintiffs argue that it may be inferred that DuPont seriously considered the CTP during a time period prior to that date. Second, Plaintiffs argue that DuPont seriously considered the CTP in the early portion of 1993 (or at least prior to May 1993) because DuPont was discussing

cost-cutting at DuPont in light of the economic downturn. In support of this contention, Plaintiffs argue that the CTP was the only mechanism available to DuPont to effect an involuntary layoff – labor costs are sixty percent of DuPont's costs at the Circleville plants – therefore, any discussion of cutting costs must have included a discussion of involuntary layoffs through the CTP. Third, Plaintiffs argue that even if the CTP is not the only mechanism by which DuPont could layoff employees against their will, the fact that CTP was one of many options discussed does not foreclose the possibility that DuPont seriously considered the CTP. Plaintiffs cite the Berlin case in support of this last contention.

i. No Serious Consideration Until May 1993

Plaintiffs assert that "[i]t is truly inconceivable given the economic conditions, the mandate for cost cutting and the existence of CTP as the only way to cut personnel, that Defendants can legitimately argue that there was no serious consideration prior to May 1993." (Doc. # 44 at 43.)

DuPont admits that the CTP was the only tool available for involuntary work force reductions. Furthermore, DuPont also admits that cost control issues were discussed in early 1993. However, DuPont argues that it does not follow that the CTP was seriously considered for implementation at Circleville in early 1993. The Court agrees with DuPont.

Plaintiffs' argument requires a leap of logic too large to create a genuine issue of fact. In considering a motion for summary judgment, the Court must draw only justifiable

inferences in favor of the nonmoving party. See Liberty Lobby, 477 U.S. at 248. Plaintiffs argument requires an unjustified inference. To reach Plaintiffs' conclusion from their initial premises requires at least three steps of logic that Plaintiffs fail to support with evidence. First, although Circleville management was discussing cost-cutting issues in early January, it does not follow that serious consideration was given to cutting personnel. Next, even if personnel reductions were discussed, it does not necessarily follow that an involuntary personnel reduction under the CTP was discussed. Last, even if the CTP was discussed and considered, it does not follow that the nature of the discussions amounted to serious consideration as opposed to information gathering for the purpose of gaining an appreciation of the options. Cf. Muse, 103 F.3d at 494. Plaintiffs present no evidence to support any of these links. DuPont, on the other hand, presents evidence that tends to negate these logical links.

DuPont presents evidence that CTP was one of numerous cost-control options available to Circleville management. (See Milliken Aff. at ¶¶ 7-9.) Other cost control tools available included expansion of businesses, normal attrition, performance related employee terminations, total plant hiring controls, retirement rates, product development, rollback of positions and implementation of new organizational technologies. (See id.) Moreover, both parties agree that early retirement incentives had not been used as a cost-control device at Circleville in the past. DuPont presents evidence that in the past the Circleville Plant used the other tools available to control costs. (See id.) These points demonstrate (1) that there were numerous other cost-cutting tools, including tools unrelated to personnel reductions,

available to Circleville management, (2) that there were personnel reduction tools other than the CTP (e.g., normal attrition, performance related terminations, and hiring controls) available to Circleville management and (3) that the Circleville plant had successfully used these other tools to meet its economic commitments in the past even while other DuPont plants had employed retirement incentives as a personnel reduction tool. The Court concludes that given DuPont's evidence Plaintiffs' circumstantial argument fails to create a genuine issue of material fact.

Plaintiffs rely on Berlin to establish that there exists a genuine issue of fact as to when DuPont seriously considered the CTP, even if the CTP was one of many options discussed. Plaintiff's reliance is misplaced. Unlike the record in this case, the record in Berlin established that during the relevant time period, the plan in question was discussed in a number of meetings, the plan was considered by high-level managers, and that certain cost-effectiveness studies were prepared. Berlin 858 F.2d at 1160. From this evidence, the Berlin Court concluded that a genuine issue of fact existed as to when the company seriously considered the plan. See id. at 1163.

The record in this case is not nearly so well developed. Plaintiffs present no evidence to show that prior to May 6-7, that (1) DuPont held any meetings in which the CTP was discussed, (2) DuPont's high level management was considering the CTP and (3) DuPont prepared any cost effectiveness studies.

Plaintiffs' only evidence that DuPont must have been seriously considering the CTP early in 1993 is (1) that

historically DuPont's decision-making process has been slow and (2) that redeployment, the focus of CTP, was occurring within DuPont as early as January, 1993. Evidence of DuPont's historical decision-making process is, however, inapposite to this case for three main reasons. First, again as a circumstantial inference, evidence of DuPont's historical decision-making process only vaguely supports the conclusion Plaintiffs seek to establish. Second, DuPont presents a significant amount of evidence providing a minutely detailed account of how the decision to implement the CTP was reached. Against this evidence, Plaintiffs offer their arguments based on induction and supported by plant rumor. Last, the logic of Plaintiffs' argument is flawed because it relates to a decision-making process that no longer exists. DuPont presents evidence that a new decision-making structure was implemented in early 1993. This new structure was designed to streamline the decision-making process. Plaintiffs provide no evidence to contradict DuPont's evidence that this structure was recently implemented or that its purpose was to create a more efficient decision-making process. Certainly, the existence of a new, more efficient decision-making process, undermines Plaintiffs' inductive leap based on DuPont's old, less efficient, decision-making process.

Next, Plaintiffs claim that because the focus of the CTP is redeployment, the fact that redeployment was occurring early in 1993 shows that DuPont was considering the CTP in early 1993. Again, this argument requires an inference that is unwarranted. Plaintiffs present no evidence to support the connection between the redeployment occurring in early 1993 and the CTP. DuPont presents evidence that refutes such a connection. Lynn Milliken testified that the

redeployment occurring early in 1993 was routine and unrelated to the CTP. (Milliken Aff. at ¶ 8.) Therefore, the Court concludes that Plaintiffs fail to show a genuine issue of material fact that DuPont seriously considered the CTP prior to May 1993.

In sum, the Court concludes that there is no evidence or reason to believe that DuPont was seriously considering implementing the CTP in early 1993. DuPont presents evidence tending to show that it did not seriously consider the CTP in early 1993. Plaintiffs respond to this evidence with arguments based on induction and circumstantial evidence. These arguments leave large gaps of logic unfilled by evidence. The Court recognizes that Plaintiffs are at a disadvantage in terms of evidence gathering, but they have been afforded extensive discovery (including deposing DuPont's decision-makers) and have not produced any affirmative evidence that serious consideration of the CTP occurred before May 1993. Accordingly, the Court concludes that Plaintiffs fail to come forward with evidence sufficient to create a genuine issue of material fact with respect to whether DuPont seriously considered the CTP prior to May 1993.

ii. Serious Consideration Might Have Occurred Before May 12, 1993

Plaintiffs assert that during a meeting with Plaintiffs Bradney and Holbrook, Ben Waide, the Director of Operations at DuPont Films, admitted to them that the final decision on the CTP was made at the first Group I meeting in Baltimore. (See Doc. # 44 at 41.) Bradney testified to this fact. (See Doc. # 44, Ex. 1 at 1-2.) Holbrook corroborates

the meeting and the discussion. (See Doc. # 44, Ex. 3 at 2.) Waide testified that he can't recall making the statement. (Waide Depo. at 120-25.) Plaintiffs appear to conclude that Waide's failure to recall making the statement establishes the fact that final decision to implement the CTP occurred on May 12. Again, Plaintiffs' logic is incomplete. At best, the evidence shows that Waide told Bradney and Holbrook that the final decision to implement the CTP was made on May 12. As stated above, DuPont presents a substantial amount of evidence that shows that the final decision was not made until June 1993. However, Waide's alleged admission, unlike Dillard's testimony, does not stand alone. Rather, it is consistent with DuPont's evidence and explanation except with respect to the decision date. Thus, Wade's alleged admission establishes a genuine issue of material fact about when DuPont first decided to implement the CTP. In addition, if DuPont decided to implement the CTP on May 12, the Court concludes that there is a genuine issue of material fact as to whether DuPont seriously considered implementing the CTP as early as May 6-7 meeting. However, the Court concludes that there is no evidence to show or reason to conclude that DuPont may have seriously considered implementing the CTP earlier than the May 67 meeting. Indeed, there is substantial amount of evidence that tends to show that the CTP was not seriously considered until at least May 18, 1993. Nonetheless, the Court concludes that Bradney's testimony creates a genuine issue of material fact that cannot be resolved by this Court on summary judgment.

6. Conclusion

The Court concludes that this matter must proceed to trial on the issue of when DuPont first ~~seriously~~ considered

the CTP at the Circleville plant. The Court notes that there is no evidence to suggest that serious consideration occurred prior to May 6, 1993. As a result, because they are the only Plaintiffs to retire after that date, only the claims of Plaintiffs Bradney and Howard survive DuPont's motion for summary judgment.

B. DISCRIMINATION

In Count II of their Complaint and of their Amended Complaint, Plaintiffs allege that DuPont violated 29 U.S.C. § 1140 (1996) ("§ 1140"). (See Doc. # 1 at ¶ 32; 94-1265, Doc. # 3 at ¶ 36.) Section 1140 makes it illegal to "discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . ." 29 U.S.C. § 1140.

The seminal case in the Sixth Circuit on ERISA discrimination claims is Humphreys v. Bellaire, 966 F.2d 1037, 1043 (6th Cir. 1992). In Humphreys, the Court established the following analysis for ERISA discrimination claims:

> [T]o avoid summary judgment on a section 1140 claim, a plaintiff must show the existence of a genuine issue of material fact that there was: "(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." [Gavalik v.

Continental Can Co., 812 F.2d 834, 852 (3d Cir. 1987).]

This Court has noted that in order to show that he was discharged in violation of Section 1140, a plaintiff "must show that an employer had a specific intent to violate ERISA." Rush v. United Technologies, Otis Elevator Div., 930 F.2d 453, 457 (6th Cir. 1991). The plaintiff is not required to show that the employer's sole purpose in discharging him was to interfere with his pension benefits, but rather that it was "a motivating factor" in the decision. Meredith V, Navistar Int'l Transp. Corp., 935 F.2d 124, 127 (7th Cir. 1991); [Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 238 (4th Cir. 1991)]; [Dister v. Continental Group. Inc., 859 F.2d 1108, 1111 (2d Cir. 1988)]; Titsch v. Reliance Group, Inc., 548 F. Supp. 983 (S.D.N.Y. 1982), aff'd, 742 F.2d 1441 (2d Cir. 1983).

If the plaintiff proves a prima facie case as set forth above, it is the employer's burden to "introduce admissible evidence of a legitimate, nondiscriminatory reason for its challenged actions." Gavalik, 812 F.2d at 853; see Dister, 859 F.2d at 1112 (same, but noting that employer "need not persuade the court that it was actually motivated by the proffered reasons"). If the employer fails to do so, judgment should then be rendered for the plaintiff. Gavalik, 812 F.2d at 853. If the

> employer successfully asserts a legitimate reason for its actions, then the presumption of wrongful action drops from the case, and the plaintiff must either prove that the interference with pension benefits was a motivating factor in the employer's actions or prove that the employer's proffered reason is unworthy of credence. Id. at 853; Dister, 859 F.2d at 1112.

Humphreys, 966 F.2d at 1043. See also Smith v. Ameritech, 129 F.3d 857, 864-66 (6th Cir. 1997); Sahid v. Ford Motor Co., 76 F.3d 1404, 1411 (6th Cir. 1996).

DuPont initially argues that Plaintiffs cannot establish that DuPont engaged in prohibited conduct or that DuPont had a specific intent to violate ERISA. (Doc. # 39 at 35-36.) In response, Plaintiffs argue that DuPont engaged in prohibited conduct when DuPont officials made "repeated statements to Plaintiffs and other employees . . . that the company would never offer an early retirement incentive, or CTP, while it was hiring at its Circleville Plant." (Doc. # 44 at 48.) Plaintiffs apparently argue that the proximity of the misrepresentations to the implementation of the CTP demonstrate DuPont's intent to discriminate against them and presumably prevented them from attaining their rights under the CTP. In reply, DuPont argues (1) that none of its officials said that the CTP would never be offered at Circleville; (2) that even if such statements were made they were merely predictive and do not constitute misrepresentations supportive of an ERISA discrimination claim; and (3) that Plaintiffs cannot establish DuPont had the specific intent to violate

ERISA because Plaintiffs cannot establish that DuPont violated ERISA. (Doc. # 46 at 21-22.)

The Court concludes that the same issues of fact that exist with respect to Plaintiffs fiduciary duty claims, see infra, section III.A.5.b.ii, preclude DuPont's motion for summary judgment with respect to Plaintiff Bradney and Howard's discrimination claims. In particular, there are genuine issues of fact as to whether the statements at issue were misrepresentations and were in violation of ERISA. As to the specific intent requirement, this Court follows the Humphreys Court, among others, in concluding that the proximity of the alleged illegal conduct to the employee's eligibility for the benefit creates at least some inference of intentional prohibited activity. See Humphreys, 966 F.2d at 1044; Shahid, 76 F.3d at 1413. Therefore, the Court denies DuPont's motion as it relates to Bradney and Howard's discrimination claim.

On the other hand, for the same reasons stated above, the Court grants DuPont's motion as it relates to the other Plaintiffs' discrimination claims. The Court concluded above that there are no genuine issues of material fact with respect to whether the DuPont engaged in prohibited conduct with respect to Plaintiffs Meenach, Marshall, Holbrook and Valentine. Thus, the Court concludes that these Plaintiffs fail to establish the elements of their prima facie case for their ERISA discrimination claims.

C. EQUITABLE ESTOPPEL

Plaintiffs oppose DuPont's motion for summary judgment in part because they allege that DuPont fails to address Plaintiffs' equitable estoppel claim. (Doc. # 44 at

49.) DuPont's response is two-fold: First, DuPont claims that Plaintiffs failed to plead equitable estoppel as a theory for relief; second, DuPont claims that Plaintiffs fail to establish their claim for equitable estoppel.

Although the Court agrees with DuPont that Plaintiffs failed to plead equitable estoppel in their Complaint or their Amended Complaint,[9] Sixth Circuit precedent mandates the conclusion that Plaintiffs have adequately raised their equitable estoppel claim. The Sixth Circuit stated the applicable rule as follows:

> a party has presented an issue for trial if that party has raised it either in the pleadings or the pretrial order, or if the parties have tried the issue by consent. . . . The raising party must present the issue so that it places the opposing party and the court on notice that a new issue is being raised.

Swinney, 46 F.3d at 522 (quotations and citation omitted). The Swinney Court applied this rule to an ERISA action similar to this action. In Swinney, the plaintiffs raised an equitable estoppel claim for the first time in their Proposed Findings of Fact and Conclusions of Law, given to the district court before a bench trial; they raised it again in their opening statement. See id. There was no pretrial order and the

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[9] The only portions of the Complaint or the Amended Complaint that mention equitable relief are the Plaintiffs' general claims for relief which state as follows: "On all Counts, for such further and additional relief both equitable and legal, as the Court may deem proper and just." (Doc. # 1; 94-1265 Doc. # 3 at 8.)

district court did not rule on an objection to the claim raised by the defendants in their opening statement. See id. Nevertheless, the Sixth Circuit held that "the defendant and the district court clearly had notice of the equitable estoppel claim." Id. In reaching this conclusion, the Circuit Court relied upon two facts: (1) plaintiffs raised the equitable estoppel claim in their Proposed Findings of Fact and Conclusions of Law and in their opening statement; and (2) the merits of the equitable estoppel claim were actually addressed by the district court in ruling on a different claim. See id.

Given this precedent, the Court concludes that Plaintiffs' failure to plead its equitable estoppel claim is not a sufficient basis to grant DuPont's motion for summary judgment. The claim is based on the same factual allegations that make up Plaintiffs' fiduciary duty and discrimination claims. Thus, DuPont had notice of the basis for Plaintiffs' equitable estoppel claim. Plaintiffs in this case raise the issue of equitable estoppel much earlier in the trial proceedings than the Plaintiffs in the Swinney case. Moreover, although Plaintiffs failed to expressly raise a claim for equitable estoppel in their Complaint or Amended Complaint, they did set forth sufficient allegations in these pleadings to satisfy the essential elements of an equitable estoppel claim. See Swinney, 46 F.3d at 522-23 (setting forth elements of an equitable estoppel claim in an ERISA action). (See also Doc. # 1 at ¶¶ 26-29, 31, 32; 94-1265, Doc. # 3 at ¶¶ 30-33, 35-38.) Therefore, the Court must reject DuPont's first basis for its motion for summary judgment.

Nevertheless, because the Plaintiffs' equitable estoppel claim is based on the same allegations upon which their other

claims are based, the Court's prior rulings apply to the equitable estoppel claim with equal force. Accordingly, the Court concludes that Plaintiffs Meenach, Marshall, Holbrook and Valentine fail to present a genuine issue of material fact with respect to the essential elements of their equitable estoppel claim. The Court **GRANTS** DuPont's motion with respect to their equitable estoppel claim. For the same reasons as stated above, the Court **DENIES** DuPont's motion in so far as it relates to Plaintiffs Bradney and Howard and their equitable estoppel claim.

IV. CONCLUSION

Upon consideration and being duly advised, the Court **GRANTS IN PART AND DENIES IN PART** DuPont's motion for summary judgment. The Court **GRANTS** DuPont's motion with respect to all of the claims of Plaintiffs Don Meenach, James Marshall, Hobart Holbrook and Roger Valentine. These Plaintiffs are dismissed from this case. The Court **DENIES** DuPont's motion as it relates to all claims by Plaintiffs Bradney and Howard.

IT IS SO ORDERED.

/s/_____
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
DEC 21 20
OFFICE OF THE CLERK

No. 00-842

In the Supreme Court of the United States

JOHN J. HOWARD,

Petitioner,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, PENSION RETIREMENT PLAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD A. CHESLEY
Counsel of Record
JONES, DAY, REAVIS & POGUE
77 WEST WACKER
SUITE 3500
CHICAGO, IL 60601-1692
(312) 782-3939

Counsel for Respondents

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

1. Can a plaintiff prevail on ERISA fiduciary duty and discrimination claims absent "serious consideration" of a plan offering at the time the statements at issue are made, or material misrepresentations of then-existing facts by an employer-fiduciary?

2. Whether the magistrate judge, the district court and the Sixth Circuit Court of Appeals properly decided the issues of liability.

3. Whether this case presents a basis for this Court to exercise its certiorari powers.

CORPORATE DISCLOSURE

Respondent E.I DuPont de Nemours and Company is a publicly traded company, which has no publicly traded parent or subsidiary companies.

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OPINIONS BELOW

While the Petitioner has noted that the trial of the underlying matter was conducted before a magistrate judge, the Petitioner has curiously failed to cite to the Court that detailed decision or include it in an appendix. Accordingly, a copy of the Report and Recommendation of the Magistrate Judge from the United States District Court for Southern District of Ohio (Eastern Division) is included in Appendix 1 at 1a-31a.

STATEMENT OF THE CASE

Petitioner's Statement of the Case includes numerous misstatements and omissions of fact. Accordingly, Respondents offer the following as a correct account of the facts in this case.

A. Background To The CTP Offering

Petitioner was a former senior supervisory employee within the Respondents' Mylar operations at its Circleville, Ohio facility. Because the Circleville plant had four separate businesses on-site, Circleville management traditionally had a significant degree of flexibility in dealing with all site issues. (Respondents' Appendix 1 at 3a). Nowhere was this flexibility more apparent than in how the facility historically dealt with economic downturns in its business lines. While Circleville's sister plants -- which had only one business -- generally had to participate in early retirement incentives to meet these economic declines, the Circleville facility historically preserved DuPont jobs through a combination of natural attrition and redeployment. (*Id.* at 4a).

Circleville's ability to preserve everyone a job within DuPont did not diminish the efforts of many of its senior employees to continually explore whether retirement incentives would be offered at the Circleville plant. Indeed, as the magistrate judge noted, "the issue of early retirement incentives was raised at virtually every meeting of supervisors . . . . " (*Id.* at 6a). While the Petitioner claims that Respondents' representatives made unequivocal statements that no such offerings would be made (Petition at 2), the statements made by DuPont management were far less unequivocal, and as the magistrate judge noted, were accurately conditioned on the Circleville plant maintaining its significant attrition rate. (Respondents' Appendix 1 at 6a).

There is no dispute that the financial performance of DuPont's Mylar operations was weak during the first quarter of 1993. (*Id.* at 4a). Not surprisingly, these economic concerns were addressed at the Mylar strategic quarterly meeting that took place on May 6-7, 1993 -- a week before the Petitioner's long-announced retirement date. (*Id.* at 8a). At that meeting, the group, which included the Circleville plant manager, Lynn Millikin, conducted a "brainstorming" session where 28 separate suggestions were made so that the Mylar operations could get "ahead of the competitive curve." (*Id.* at 9a). No decisions were made at this meeting, and a sub-group met one week later "to consider various methods to reduce the cost structure of" the Mylar operations. (Petitioner's Appendix B at 12a). At that meeting, it was decided that the plant managers would perform a "zero-based restructuring analysis," under which they would examine the functions of their facility and these related costs, and then eliminate those functions that were not cost-effective. (*Id.*). The testimony was undisputed that, throughout this period, Lynn Millikin, who had decision-making authority over the Circleville facility, did not believe that Circleville would need

to eliminate any employees from its rolls, but that the facility could, as it had done historically, deal with the economic downturn through natural attrition and redeployment. (*Id.* at 13a).

B. The Decision To Use CTP At The Circleville Plant

Lynn Millikin began the zero-based restructuring on May 14, 1993, and by May 19, 1993, had summarized the preliminary results of this analysis. (*Id.* at 14a). This review indicated that Circleville in fact could not meet its economic targets through its traditional means, but would have to eliminate employees from its rolls. Because the de-selection tool to be used contemplated that younger employees would be eliminated, Millikin concluded that he could not meet the economic targets because it would "mortgage the future of Circleville." (*Id.*). Recognizing the problems that confronted the Circleville plant, on May 21, 1993, the Mylar human relations director requested that DuPont's director of human resources consider allowing senior employees to "volunteer" to take the positions of junior employees whose positions were going to be eliminated. (*Id.*).

On May 24, 1993, the Mylar sub-group met again to review the results of the zero-based restructuring. (*Id.*). During the course of that meeting, the group was informed "that DuPont agreed that plant managers could seek 'expressions of interest' from non-excess personnel if the CTP were used at any plant." (*Id.*). The evidence was undisputed that it was at this point -- ten days after the Petitioner had retired -- that Millikin (the ultimate decision-maker) first believed that the CTP could even be offered at the Circleville plant. (*Id.*). Subsequently, on June 11, 1993, the Circleville plant determined to meet its economic targets through a

reduction in force, and accepted senior employees' expressions of interest. (*Id.* at 15a). On June 20, 1993, thirty-one senior employees were removed from the rolls at Circleville with CTP benefits. (*Id.*).

C. The Decisions Of The Courts Below

Based upon this factual record, the magistrate judge recommended that judgment be entered on behalf of Respondents, as it was not until May 24, 1993 -- ten days after the Petitioner's voluntary retirement -- "that the CTP proposal was sufficiently concrete to support consideration by those with authority to implement it . . . . " (Respondents' Appendix 1 at 27a). The Petitioner timely appealed to the United States District Court for the Southern District of Ohio, which, after conducting a *de novo* review of the magistrate judge's findings, rejected each of the Petitioner's eight objections. (Petitioner's Appendix B at 15a - 28a). After properly giving deference to the "District Court's credibility findings," the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court. (Petitioner's Appendix A at 4a - 5a).

ARGUMENT

A. There Is No "Split" Among The Circuits On The Issue Presented In This Case

In an effort to obtain certiorari review, Petitioner contends that:

> different courts have set different standards regarding when an employer-fiduciary violates a fiduciary duty under ERISA while making

representations to employee-beneficiaries . . .

(Petition at 9). Not only is the Petitioner's lone basis in support of review overly simplistic, but it is factually inapposite to the case presented below.

At the outset, as Petitioner correctly notes, the magistrate judge, district court and Sixth Circuit Court of Appeals applied what has commonly been referred to as "the serious consideration doctrine" to its analysis of Petitioner's fiduciary duty and discrimination claims under the Employee Retirement Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1994). Under this doctrine, an employer's fiduciary duties are not triggered until it "seriously considers" the implementation of a new plan or a change to an existing one. *McAuley v. IBM Corp.*, 165 F.3d 1038, 1043 (6th Cir. 1999). This rule is an attempt to balance the right of employees to have factually accurate information, with the statutory mandate that employers owe no fiduciary duty to employees in deciding whether to adopt, modify, implement or terminate a benefit plan. *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992). It also recognizes that employers do not have a "'duty of clairvoyance,' i.e., to predict accurately the future availability of benefits." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988). Thus, as the Sixth Circuit cogently explained:

> Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that 'employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended.' H.R. Rep. No. 533, 93rd Cong., 2d Sess. VI (1974) reprinted in 1974 U.S.C.C.A.N. 4639.

> Insisting on disclosure during the formulation of a plan and prior to its adoption would increase the likelihood of confusion on the part of beneficiaries. At the same time management would be unduly burdened by the continued uncertainty of what to disclose and when to disclose it. Moreover, any requirement of pre-adoption disclosure could impair the achievement of legitimate business goals.

Muse v. IBM Corp., 103 F.3d 490, 494 (6th Cir. 1996).

Recognizing these competing considerations, the Sixth Circuit has adopted two related tests of serious consideration. Under the first, serious consideration does not exist until a company focuses on a "particular plan for a particular purpose." *Id.* Recently, the Sixth Circuit refined the standard so that serious consideration occurs when three factors converge: (1) a specific proposal (2) discussed for purposes of implementation (3) by senior management with authority to implement the change. *McAuley*, 165 F.3d at 1043-44. The initial two factors insure that liability is not imposed on employers who are simply engaged "in the antecedent steps of gathering information, developing strategies, and analyzing options." *Fisher v. Philadelphia Elec. Co. (Fisher II)*, 96 F.3d 1533, 1539-40 (3d Cir. 1996); *see also Muse*, 103 F.3d at 494. The final element ensures that the analysis focuses on the proper actors within the corporate hierarchy. *Fisher II*, 96 F.3d at 1540. Thus, under the serious consideration doctrine, statements made before an employer seriously considers a plan modification are not material, and thus not actionable as a breach of fiduciary duty or ERISA discrimination.

As the serious consideration doctrine does in fact balance the competing interests contemplated by Congress in promulgating ERISA, it has been embraced throughout the Circuits. *See Binns v. Exxon Company U.S.A.*, 220 F.3d 1042, 1049 (9th Cir. 2000) *(en banc)* ("We similarly believe that *Fisher II's* serious consideration test is the proper tool for ensuring that an ERISA employer-fiduciary discharges its 'duties with respect to a plan solely in the interest of the participants and beneficiaries'"); *Vartanian v. Monsanto Co.*, 131 F.3d 264, 272 (1st Cir. 1997); *Hockett v. Sun Co., Inc.*, 109 F.3d 1515, 1523 (10th Cir. 1997); *Fisher II*, 96 F.3d at 1538; *Wilson v. Southwestern Bell*, 55 F.3d 399, 405 (8th Cir. 1995); *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir. 1991).

In the face of this overwhelming weight of authority, Petitioner claims that these holdings "squarely conflict with the holding of the Second Circuit" in *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 122 (2d Cir. 1997).[1] (Petition at 9). The Petitioner's sole claim is not only legally in error, but it is, as the courts below have found, factually unsupportable. In *Ballone*, the plaintiffs had alleged that during the time Kodak was considering downsizing its

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[1] The Petitioner also claims that "there is evidence that the First and Ninth Circuits are at least sympathetic to *Ballone*." (Petition at 14). To the contrary, in *Vartanian*, the First Circuit Court of Appeals expressly adopted the serious consideration doctrine, but emphasized the flexibility inherent in the *Fisher II* test, noting that the ultimate issue was whether it appeared from the totality of circumstances that an enhanced benefit package was being offered. *Id.*, 131 F.3d at 272. Similarly, in *Binns*, while the Ninth Circuit Court of Appeals agreed with the First Circuit's approach, it made clear its continued adherence to the serious consideration doctrine. *Id.*, 220 F.3d at 1049.

operations, the company falsely assured certain employees that no retirement plan enhancements would be made during 1991, and that future downsizing would not occur until 1992. *Id.* at 121. Based upon these alleged misrepresentations, the plaintiffs retired shortly before the retirement incentives were offered in August 1991. *Id.* The district court found that because Kodak did not seriously consider implementing the retirement incentives until July 25, 1991, no misstatements made prior to that date were "material." *Id.*

On appeal, the Second Circuit Court of Appeals focused its analysis on the allegations that Kodak had intentionally misinformed plan beneficiaries about the availability of retirement incentives to induce them to retire. *Id.* at 124. According to the Second Circuit, "[w]here an ERISA fiduciary makes guarantees regarding future benefits that misrepresent present facts, the misrepresentations are material if they would induce a reasonable person to rely upon them." *Id.* at 122. Thus, the Second Circuit's analysis focused on how to determine "the materiality of false assurances like those here alleged." *Id.* at 125. In undertaking this analysis, the Second Circuit made clear that while serious consideration of the plan implementation did not have "talismanic" significance, it was one factor to consider, along with the employees' knowledge of other information regarding the plan offering and the specificity of the assurances. *Id.* at 122, 125. As the Second Circuit made clear, "[w]hereas mere predictions are not actionable, false statements about future benefits may be material if couched as a guarantee, especially where, as alleged here, the guarantee is supported by specific statements of fact." *Id.* at 125.

Thus, careful scrutiny of *Ballone* makes clear that the serious consideration analysis should be supplemented only in those rare instances where it is alleged that knowingly

material misrepresentations were made to induce plan beneficiaries to act. *See Binns v. Exxon Company U.S.A.*, 189 F.3d 929, 936 (9th Cir. 1999) ("Indeed, in many cases, applying the serious consideration test will resolve a case without further inquiry"). And, if any question remained as to the limited applicability of the *Ballone* analysis, the Court need look no further than what transpired in the wake of *Ballone*. On remand, the district court applied the Second Circuit's materiality test to the facts presented. *Radley v. Eastman Kodak Co.*, 19 F. Supp. 2d 89, 99 (W.D.N.Y. 1998). Of particular note, the district court reaffirmed that at the time the alleged representations were made, Kodak was not seriously considering the retirement incentive. *Id.* at 100. The district court then went on and analyzed the alleged misstatements made to the plaintiffs, and concluded that:

> None of the five plaintiffs have testified that Kodak representatives gave them guarantees or assurances supported by specific statements of fact. These plaintiffs do not allege that any counselor told them changes had been ruled out for any specific period of time or, more importantly that a corporate decision had been made not to amend the plan. No plaintiff testified that his/her counselor stated that the plan could not change for specific reasons such as government regulations or financial considerations. Rather all five plaintiffs allege that the counselors' representations were general statements such as 'no changes are coming in the foreseeable future,' which were true when made but which later turned out to be incorrect when the company subsequently announced [the plan modification].

Id. at 103. Based upon this record, under *Ballone* the district court found that no "material misrepresentations" were made to the plaintiffs, and thus their claims for breach of fiduciary duty and discrimination were dismissed. *Id.*

Claiming that the district court had ignored the *Ballone* holding, the plaintiffs again appealed the decision to the Second Circuit. There, the Second Circuit not only affirmed the district court's decision, but acknowledged the limited reach of its previous ruling. *Radley v. Eastman Kodak Co.*, 1999 U.S. App. LEXIS 23372 (2d Cir., Sept. 24, 1999). In *Radley*, the Second Circuit confirmed that *Ballone* was confined to the limited situation where a plaintiff can support a claim of material misrepresentation of a then-existing fact. *Id.*, *2-3.; *see also Hudson v. General Dynamics Corp.*, 118 F. Supp. 2d 226, 273 (D. Conn. 2000) (holding under *Ballone* that absent knowingly material misrepresentations, statements made prior to serious consideration of a plan offering are not actionable). The situation was not presented in *Radley* or *Hudson*, nor was it presented in the case now before this Court.

B. Petitioner's Attempt To Bring This Case Within The Limited Reach Of *Ballone* Is Unavailing

Obviously recognizing the limited reach of *Ballone*, Petitioner attempts to squeeze the facts presented within the constraints of the Second Circuit's modification of the serious consideration analysis. Not surprisingly, this effort is unavailing. While Petitioner contends that DuPont made misstatements that he relied upon, and that the law of the Sixth Circuit -- and of all others -- is but a "license to lie", this rhetoric is not only misplaced, but it is unpersuasive. (Petition at 9). Indeed, contrary to Petitioner's claims, the

courts below made clear that no material misrepresentations were made by DuPont's representatives prior to May 14, 1993, the date of his retirement. As the magistrate judge found, Petitioner's lone claim of misrepresentation stemmed from questions he raised after he signed his retirement papers in February 1993, about the availability of retirement incentives, which had never been necessary at the Circleville facility. (Respondents' Appendix 1 at 4a, 6a). In response to these inquires, the magistrate judge found that the evidence concluded that "plaintiffs were told that it was not foreseeable that CTP would be offered in light of the hiring opportunities and anticipated rate of attrition at Circleville." (*Id.* at 29a n.11).

Petitioner does not, however, contend before this Court, nor has he ever, that these statements were knowingly false, i.e. misrepresentations of then existing facts.[2] Indeed, based upon the considerable record adduced below, Petitioner could not make such a claim. As the magistrate judge and the district court properly concluded, up until well after Petitioner had retired from DuPont, Lynn Millikin, the ultimate decision-maker on retirement modification had no reason to

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[2] The closest that Petitioner comes to making this contention is his reliance upon the testimony of Robert J. Dillard that these representations should not have been made. (Petition at 8). In fact, the magistrate judge rejected Petitioner's reliance on this testimony as Mr. Dillard had no role in the decision to implement the retirement offering and reached his conclusion after the relevant decisions had been made. (Respondents' Appendix 1 at 22a-23a). As the magistrate judge concluded, "[t]his *post hoc* justification, made by one not involved in the decision-making process, simply is not determinative of the issue . . . . " (*Id.* at 23a). Similarly, the district court expressly discounted Mr. Dillard's testimony. (Petitioner's Appendix B at 25a).

believe that the offering would be made at the Circleville facility, or that it could even be made available to senior employees such as Petitioner. (Respondents' Appendix 1 at 11a - 14a, 21a - 27a; Petitioner's Appendix B at 15a - 18a). Therefore, even under the *Ballone* analysis, the representations made by DuPont's representatives were not misrepresentations of then-existing facts, and in fact, were truthful and accurate statements of what DuPont's management believed at the time. Thus, these statements were not actionable under ERISA. *Radley*, 1999 U.S. App. LEXIS 23372, *5 ("Nowhere in *Ballone* does this Court hold that all misleading statements are material misrepresentations"). Thus, while the courts below did not explicitly apply the *Ballone* standard to their determinations, based upon the factual record, such an analysis was not only unwarranted, but would have yielded the same result -- judgment on behalf of Respondents.

CONCLUSION

Based upon the forgoing, the Court should deny the Petition for Writ of Certiorari.

/s/_____
Richard A. Chesley
Counsel of Record
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive
Suite 3500
Chicago, Illinois 60601-1692
(312) 782-3939

Attorneys for Respondents

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed March 22, 1999]

Civil Action No. 2:94-CV-1265

JACKIE L. BRADNEY, et al.,
Plaintiffs,

v.

EI DU PONT DE NEMOURS AND COMPANY, Pension and Retirement Plan, et al.,
Defendants.

Judge Kinneary
Magistrate Judge King

REPORT AND RECOMMENDATION

Plaintiffs Jack Bradney and John Howard, former senior supervisory or exempt, employees of defendant E.I.

DuPont de Nemours and Company ["DuPont"] at its Circleville, Ohio, plant ["Circleville"], bring this action pursuant to the Employee Retirement Income Security Act of 1974 ["ERISA"], 29 U.S.C. §1001, *et seq.*, alleging claims of breach of fiduciary duty, discrimination and equitable estoppel in connection with DuPont's offer of a Career Transition Plan ["CTP"] at Circleville subsequent to plaintiffs' retirement. With the agreement of the parties, *Order* (August 10, 1998), a trial to the Court was held before the undersigned on December 1-3, 1998. The Court now makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

I

Plaintiffs' claims arise in connection with DuPont's implementation of a CTP at Circleville the month after plaintiffs' May 1993 retirements. The CTP included an offering of certain financial benefits known as Career Transition Financial Assistance ["CTFA"] to employees involuntarily separated from employment with DuPont. CTFA benefits included, *inter alia,* severance pay equal to one month's salary for every two years of service, with a minimum of two months' salary up to a maximum of twelve months' salary. Plaintiffs claim that, had they known of the impending CTP, they would not have retired when they did and would have been eligible to participate in the CTP and to receive the maximum CTFA benefits. Specifically, the case at bar centers on plaintiffs' allegations that DuPont misled them as to the status of its decision to implement the CTP at Circleville. As Judge Kinneary stated in its May 6, 1998 *Opinion and Order,* the resolution of plaintiffs' claims turns

on the issue of when DuPont first "seriously considered" the use of CTP at Circleville.

A. DuPont Organizational Structure

In 1993, DuPont's various divisions were organized into "strategic business units" ["SBUs"], semi-autonomous structures which were responsible to DuPont for a financial performance at a predetermined level. The Films SBU was comprised of eight manufacturing locations, including Circleville and a plant in Florence, South Carolina, that manufactured film-based products, including Mylar.

Michael Hartnagel, the former vice-president and general manager of the Films SBU, testified on deposition that the SBU held each plant accountable for a certain portion of the SBU's financial commitment to DuPont. Thus, Circleville's plant manager in 1992 and 1993, Lynn Millikin, was responsible not only for such matters as the safety of employees and the environmental security at Circleville, but also for meeting Circleville's financial commitment to the Films SBU. According to Hartnagel and Millikin, plant managers were delegated a great deal of authority and responsibility in determining how best to achieve their respective profit objectives.

B. The Circleville Site

Circleville had at least four businesses on-site. In addition to the Mylar line, Circleville also engaged in the "Teijin Joint Venture," the "Captar" business and a line of safety glass. The Mylar line accounted for approximately ½ of the site's operations; most, but not all, of the businesses fell within the Films SBU.

The presence of these various business lines at Circleville conferred a great deal of flexibility on Millikin in his execution of management decisions. For example, although the Florence plant, which had only a Mylar line, had participated in early retirement incentive programs in the early 1990s, Circleville did not; the combination of attrition (historically, 35 employees per year) and redeployment of personnel to other business lines at the plant enabled Circleville to meet its profit objectives without utilizing such programs.

C. Financial Climate for Mylar and the Films SBU in 1993

The evidence is undisputed that the financial performance of the Mylar business of the Films SBU for the first quarter of 1993 was weak. Historically, the weakest two months of the year have been January and February; however, the weak March result came as a surprise. By early April 1993, following receipt of these first quarter results and after consulting with DuPont global business leaders who suggested that the remainder of 1993 would see continued difficulty in the Mylar business, Hartnagel concluded that the Films SBU could fall short in its financial commitment to DuPont by as much as $20 million.

Millikin testified that, during the first quarter of 1993, Circleville had met all its spending objectives but had not met its cost objectives; the site was overspending by $300,000.00 per month. He regarded as "essential" the goal of meeting the plant's profit objective for 1993. *See Plaintiffs' Exhibit 8.*

D. Programs to Effect Personnel Reductions

Until 1993, DuPont utilized a "Voluntary Separation Program" and a "Voluntary Retirement Incentive" ["VSP/VRI"] to effect reductions in personnel. The programs contemplated voluntary participation, for which financial incentives were offered. In 1991 and 1992, VSP/VRI effected a $1 billion company-wide cost reduction by which 10,000 employees left DuPont. In October 1992, it was announced that VSP/VRI would be replaced by CTP effective January 1, 1993. *Plaintiffs' Exhibit 40.*

Corporate documents announcing CTP, while not detailed, did not eliminate, and indeed appear to contemplate, a component of volunteerism in the application of CTP. *Plaintiffs' Exhibits 40, 56, 70.* Nevertheless, and unlike VSP/VRI, CTP, was designed as a management selection tool and was intended to give management greater control over employees and employee skills affected by reduction in personnel. The program contemplates the redeployment of excess personnel to another position in DuPont or, if necessary, to assist excess personnel in obtaining work outside DuPont. In addition to training and outplacement services, CTP also offered financial benefits through the CTFA. Thus, participating employees with at least 24 years of DuPont service would qualify for a CTFA payment equivalent to an additional year's salary.

E. Plaintiffs' Claims

Jack Bradney

Plaintiff Bradney had been employed at Circleville for more than 30 years when he retired on May 14, 1993. At the time of his retirement, Bradney was an area specialist in

Mylar. Bradney knew that VSP/VRI had been authorized at other DuPont plant sites and, as he approached retirement age, he became interested in any retirement incentives for which he might qualify.

The issue of early retirement incentives was raised at virtually every meeting of supervisors, notwithstanding the publicized cautions that CTP was not to be used or viewed as a benefit to which an employee was entitled. According to Bradney, the universal response, made at various times by Hartnagel, Ben Waide, Director of Operations of the Films SBU, and Greg Funari, the former Operations/Technology Manager for Circleville's Mylar operations, was that, as long as Circleville was hiring for the Teijin Joint Venture, and as long as Circleville sustained its traditional attrition rate, there would be no personnel "excess," and Circleville would "never" offer an early retirement incentive.[1]

In February 1993, and based on these representations, Bradney signed his retirement papers. He continued to inquire about early retirement incentives in the following months, with the same response. His retirement became effective on May 14, 1993.

In late June 1993, Bradney learned of the implementation of the CTP. During the course of his ensuing attempts to participate in the program, Bradney and another retiree, Hobart Holbrook, met in Circleville with Waide. According to Bradney and Holbrook, Waide pointed to his calendar and stated that retirement incentives had been discussed at a meeting held on May 6 and 7 in Baltimore and

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[1] Funari, Waide, Millikin and others could not recall using the word "never" in their discussions with Bradney or any other employee.

that the CTP program had been finalized on May 12, 1993. In fact, Waide told Bradney that, at the May 12 meeting Millikin had mused, "How would he explain this to Mr. Holbrook?"[2]

Following his meeting with Waide, Bradney wrote a letter to Hartnagel, *Plaintiffs' Exhibit 71*,[3] expressing Bradney's belief that he had been mislead and should be given the benefits of the retirement program. Michael Carroll, then Human Resources Manager for the Films SBU, responded that, at a meeting of plant managers held in Wilmington on Monday, May 24, 1993, it became evident for the first time that restructuring at Circleville would be of such a magnitude that it could not be dealt with through normal attrition; it was only then that the decision to implement the CTP was made. *Plaintiffs' Exhibit 85*. According to Carroll, there was no program to which plaintiff Bradney was entitled or for which he was eligible.

Bradney's salary in early 1993 was $50,000.00 per year. Had he been employed at Circleville when the CTP was actually implemented, he would have been able to participate in its financial benefits.

John Howard

Plaintiff Howard, too, had been interested in an early retirement incentive. After learning that the VSP/VRI programs would be replaced by the CTP, *Plaintiffs' Exhibit 40*, and after discussions with Mary Moore, his supervisor

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[2] Waide denied identifying May 12 as the date that CTP was finalized.

[3] Although addressed to Waide, the letter was actually sent to Hartnagel.

and, perhaps with Robert Dillard, Moore's supervisor, Howard was convinced that there would be no early retirement incentives at Circleville. He retired after more than 30 years of service, on May 10, 1993. However, had he known of the CTP that was eventually offered, he would have remained employed in order to take advantage of the CTFA benefits. Had he done so, the preponderance of the evidence would indicate that he would have been able to participate in its CTP and its financial benefits.

F. Evidence on the Decision to Implement CTP at Circleville[4]

Plaintiffs contend that defendants seriously considered implementing CTP at Circleville, if not at a meeting held on May 6-7, 1993, then no later than May 12, 1993. Defendants take the position that it was not until May 24, 1993, *i.e.*, after the retirement of both plaintiffs, that the implementation of CTP at Circleville was seriously considered.

The SBU's quarterly meeting held on May 6-7, 1993, in Wilmington, Delaware, was attended by its Strategic Leadership Team, including Millikin, who took with him to the meeting a report prepared by Funari on the anticipated rate of attrition at Circleville. The participants focused singularly on financial performance; each business leader reviewed his full year forecast. Hartnagel, who presided over the meeting, directed the participants to engage in a brainstorming session of actions that might avert the expected

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[4] Plaintiffs offered the deposition testimony of James K. Marshall, Earl Tatum, Donald Meenach, and Roger Valentine, to which defendants have objected. Because the proffered testimony is either irrelevant to the resolution of plaintiffs' claims, or hearsay, or both, defendant's objections are SUSTAINED.

revenue shortfall. Moreover, Hartnagel wanted to get "ahead of the competitive curve," *i.e.*, explore fundamental changes that could avoid the need to restructure year after year.

The brainstorming sessions generated 28 different suggestions. No consensus was reached on any of those suggestions; however, Hartnagel created four subgroups to consider the suggestions and to report back by early June 1993. Group I, led by Waide, was to consider personnel issues. *Plaintiffs' Exhibit 38.*

A number of witnesses, including Hartnagel, testified that, although reductions in personnel were discussed in a general way at this meeting, there were no discussions of personnel reductions at particular work sites. Moreover, Carroll testified that he mentioned CTP at this meeting, but offered no details as to its operation.[5] Carroll testified that he knew, after reviewing Hartnagel's memo of May 7, 1993, *Plaintiffs' Exhibit 38,* that CTP would likely be used at some plant or plants. He did not know which plants would be affected, however.

Following the May 6-7, 1993 meeting in Wilmington, Group I, which had been charged with formulating methods to reduce the cost structure of the Films SBU by $4-6 million by 1994, met in Baltimore on May 1213, 1993. Prior to that meeting, on May 10 or 11, 1993, Waide and Carroll met to plan the meeting. It was agreed that each plant site would be required to perform a "zero-based restructuring analysis." A zero-based restructuring analysis is a "bottom up" approach to the evaluation of a business and its needs. The approach

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[5] Other participants in the meeting, including Millikin, did not recall that CTP was even mentioned at the May 6-7 meeting.

requires, first, the definition of tasks that are absolutely essential to the business, *i.e.*, safety, environmental and customer needs, and then those tasks that are merely discretionary, *e.g.*, new product development. By determining the operating costs associated with both essential and discretionary functions, decisions regarding cost reductions may be rendered more meaningful. Hartnagel, Carroll and Waide testified that, although the approach contemplates elimination of *tasks,* it does not necessarily contemplate elimination of personnel who might be redeployed to other positions in the company.

The May 12-13 meeting in Baltimore included plant managers like Millikin. One plant manager (not Millikin) asked whether VSP/VRI would be used if it were determined, following the analysis, that personnel would have to be released. Carroll responded that only CTP could be used. Carroll then provided a summary of CTP. Carroll testified that he personally believed at that point that CTP would likely be offered at the Florence site, but that Circleville had only a 50/50 chance of utilizing CTP. Waide testified that he did not believe at that time that Circlevillle would be one of the affected plants.

It was also agreed at this meeting that the "Reconciliation Selection Process" ["RSP"] would be used as the tool by which the plant managers would determine who would be affected by CTP, in the event the zero-based restructuring analysis indicated that personnel must be released. Carroll explained that RSP is only one of three such tools: "Last In First Out" ["LIFO"] contemplates that least senior personnel leave first; "Qualified Based Selection" ["QBS"] requires that the requisite skills, knowledge and abilities of every job be identified and employees compete for such jobs in the restructured organization; RSP combines

elements of the other two and staffs positions in the restructured organization according to the following criteria: 1) critical skills employees would be retained; 2) employees with twenty-five or more years of service would be retained; 3) employees with less than 3 years of service would be "declared excess;" 4) employees with demonstrated outstanding performance would be retained; and 5) all remaining jobs in the restructured organization would be filled on a LIFO, or seniority, basis. By these criteria, neither plaintiff, who had more than 30 years of service, would qualify for participation in CTP.

By the conclusion of the May 12-13 meeting, each plant manager was expected to perform a zero-based restructuring analysis at his site and to create a new organization, using RSP to staff that new organization.[6]

Millikin assumed that there would be excess employees in the Mylar line at Circleville. Indeed, his own notes generated at that time, *Plaintiffs' Exhibit 24,* referred to 42 excess positions. However, Millikin did not at that time assume that Circleville employees would actually be laid off in light of Circleville's history of heavy attrition and potential for redeployment to other business lines. Moreover, Millikin affirmatively rejected the idea of CTP, as the program was then formulated, because of the devastating impact it would have on the ranks of younger, skilled professionals at Circleville. Millikin explained that the average age of the exempt employees at Circleville was 48; many were in their 50's. Millikin believed that CTP, as then formulated, would eliminate most of the younger employees and would lead

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[6] There was some dispute as to whether the plant managers were given a target budget with which to work; Millikin testified that he was not.

eventually to a site without skills. Rather, Millikin believed that Circleville could meet its financial goals, if over a longer period of time, without the use of CTP and by continuing to rely on attrition and redeployment to other businesses at Circleville.

Millikin's notes generated during the May 12-13 meeting, *Plaintiffs' Exhibit 24,* p. 943, contain the notation, "trade OK?" with arrows pointing to the two RSP categories dealing with years of service. He testified that this notation reflected his concerns about "mortgaging the future" at Circleville and his inquiry of Carroll in that regard. Carroll made clear that such an option would not be available. *Plaintiffs' Exhibit 25,* p. 943, reflects Millikin's notes generated immediately after the May 12-13 meeting. These notes appear to refer to a procedure whereby more senior employees could volunteer to take the CTP "package" of less senior employees excessed by CTP. Millikin testified that both exhibits reflect his efforts to anticipate an aggressive, and only speculative, approach to cost-cutting at Circleville, and did not reflect a conclusion on his part that any Circleville employees would actually be let go.

On May 14, 1993, *i.e.,* the date on which Bradney's retirement became effective, Millikin convened a meeting of his site leadership team at Circleville to communicate the results of the May 12-13, 1993 meeting in Baltimore and to plan the zero-based restructuring analysis. Millikin also reviewed with his team the CTP as then formulated.

On May 19, 1993, Millikin summarized the preliminary results of the zero-based restructuring analysis, which list those employees who would presumptively be excessed. None on the list had more than 14 years' experience. *Defendants' Exhibit P.* Millikin testified that these

results confirmed his belief that CTP, as then formulated, would "mortgage the future" of Circleville.

Both Waide and Carroll were aware of Millikin's concerns about the effect of CTP on Circleville. On May 21, 1993, Carroll met with William Reynolds, Director of Human Resources, to discuss the possibility of restructuring without decimating the pool of younger employees at Circleville. Reynolds agreed to seek corporate approval for some element of voluntariness in the implementation of CTP.

Group I met again on May 24-25, 1993, in Wilmington. Millikin presented the results of the zero-based restructuring analysis at Circleville. *Defendants' Exhibit R.* At some point, Carroll was called out of the meeting to speak with Reynolds, who communicated corporate approval to seek "expressions of interest" in participation should CTP be implemented at any plant. Carroll relayed that information to those attending the meeting. Millikin immediately left to call his plant, expressing concern for those Circleville employees in the process of, or contemplating, retirement.[7] At the conclusion of the May 24-25 meeting in Delaware, Carroll undertook to formulate guidelines for implementing a CTP that would accept expressions of employee interest. *See Defendants' Exhibit U.* Millikin testified that it was only on May 24, 1993, that he seriously considered utilizing CTP, as modified, at Circleville.

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[7] Funari had testified on deposition that Millikin made this call on approximately May 18. At trial, however, Funari recalled that the call occurred on May 24. In any event, the conversation occurred after both plaintiffs had retired.

Carroll met with various human resources managers on June 1-2 in Richmond, Virginia, to offer concrete guidance on the implementation of CTP, as modified.

The Films SBU Strategic Leadership Team then re-convened in early June 1993. Each of the four groups reported back their consensus recommendations on ways to achieve target cost reductions assigned to them. Sometime thereafter, Hartnagel formally authorized the restructuring of the Films SBU, utilizing the modified CTP. The actual decision to utilize CTP at any particular plant, however, remained with each plant manager.

Millikin announced his decision to implement CTP at Circleville on June 11, 1993, and sought employees' expressions of interest beginning that same date. *Plaintiffs' Exhibits 1, 3.* Robert Dillard, Business Services and Supply Chain Manager at Circleville, testified on deposition that he was surprised by the announcement in light of Circleville's history of attrition and hiring for the Teijin Joint Venture.[8] *Depo. of Robert Dillard,* at 143. After a day or two, and after reviewing the "revenue projections," Dillard concluded that attrition would not effect the necessary cost reductions. *Id.*, at 147.

On June 20, 1993, Millikin announced that Circleville would reorganize its Mylar operations and that its rolls would

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[8] Dillard, who did not participate in the decision to implement CTP at Circleville, *Depo.* of *Robert Dillard,* at 37, also testified that the decision to use CTP at Circleville was mandated by "Wilmington." *Id.*, at 31.

be reduced by 31 employees.[9] Indeed, this number was higher than other plants affected by CTP at that time. At the time CTP was implemented at Circleville, hiring for the Teijin Joint Venture continued.

II

A. Breach of Fiduciary Duty

Legal Standard

29 U.S.C. §1104(a) (1) imposes certain obligations on ERISA plan fiduciaries:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and
> (A) for the exclusive purpose of:
> (I) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

As a consequence of these obligations, "[m]isleading communications to plan participants 'regarding plan

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[9] Millikin also testified that more than 31 positions may have been declared excess and that some employees may have been redeployed to other businesses at Circleville.

administration (for example, eligibility under a plan, the extent of benefits under a plan) will support a claim for a breach of fiduciary duty.'" *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied,* 508 U.S. 940 (1993), quoting *Berlin v. Michigan Bell Telephone* Co., 858 F.2d 1154, 1163 (6th Cir. 1988). In *Berlin,* the Court concluded that misrepresentations, whether negligent or intentional, made to potential plan participants concerning a prospective or contingent ERISA plan, give rise to liability if the plan was under "serious consideration" at the time the representations were made. *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d at 1163-64. However, a plan administrator is not required to predict an eventual decision; rather the administrator must "fairly disclose[] the progress of its serious considerations to make a plan available to affected employees." *Drennan v. General Motors Corp.*, 977 F.2d at 251, citing *Berlin,* 858 F.2d at 1164.

Thus, the triggering event for establishing a breach of fiduciary duty for alleged misrepresentations concerning a benefit plan is "serious consideration." Any misrepresentations made after the plan undergoes serious consideration can constitute breach of fiduciary duty; however, "misrepresentations made before serious consideration trigger no such duty." *Muse v. IBM* Corp., 103 F.3d 490, 494 (6th Cir. 1996), *cert. denied,* 117 S. Ct. 1844 (1997). Indeed, in its earlier grant of partial summary judgment, this Court concluded that an employer has no fiduciary duty to make disclosures regarding employee benefit plans "until it first seriously considers implementing a benefit plan." (May 6, 1998 *Opinion and Order* at 20). "[W]hether a plan was under 'serious consideration' and any misrepresentations concerning the employer's consideration of a plan . . . [are] question[s] of fact." *Drennan v. General*

Motors Corp., 977 F.2d at 251; *Berlin v. Michigan Bell Telephone* Co., 858 F.2d at 1164.

The issue of determining when serious consideration occurs was discussed by the United States Court of Appeals for the Sixth Circuit in *Muse v. IBM Corp.*, *supra*. The Court in *Muse* held that serious consideration "does not apply until a company focuses on a particular plan for a particular purpose." *Muse*, 103 F.3d at 494. In that case, defendant IBM offered several voluntary early retirement programs to employees at its Lexington, Kentucky site. Each of the plaintiffs in the class had opted for early retirement pursuant to a plan available at the time. Approximately five months after plaintiffs' retirement, IBM offered yet another retirement plan with a greater monetary incentive. Plaintiffs alleged in *Muse* that they would have chosen to participate in the latest plan had IBM not negligently or intentionally misrepresented to plaintiffs that no additional retirement plan would be offered. IBM asserted that its consideration of the later plan was triggered by its decision to sell the Lexington site, which decision occurred after plaintiffs' retirement. In reviewing the evidence presented, the Sixth Circuit noted that, although IBM had contemplated the sale of its Lexington plant prior to plaintiffs' retirement, it was the actual decision to sell that caused IBM to "focus on this particular [retirement] plan for a particular purpose," thus amounting to serious consideration. *Muse v. IBM Corp.*, 103 F.3d at 494. Prior to that time, the Court concluded, IBM's consideration of a better retirement plan was not "for any reason other than to gain a general appreciation of its options." *Id.*

The Sixth Circuit once again addressed the concept of serious consideration in *McAuley v. IBM Corp.*, 165 F.3d 1038 (6th Cir. 1999). That case also centered on the retirement of a class of plaintiffs from the Lexington, Kentucky, IBM

plant. Plaintiffs had retired just prior to IBM's announcement of a plan that offered greater retirement benefits. One of the plans offered during plaintiffs' employment involved a preretirement leave of absence; the actual retirement date and benefits would be fixed at a later date in accordance with any IBM retirement plan then in existence. Plaintiffs claimed that, prior to their retirement, it had been represented to them that this option held no financial advantage; thus, plaintiffs retired under other plans and were therefore unable to take advantage of the enhanced retirement benefits of the new plan.

In determining when IBM had given serious consideration to the new plan, the Court in *McAuley* relied on *Muse v. IBM Corp., supra,* and on a three factor test established in *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3rd Cir. 1996), *cert. denied,* 117 S. Ct. 1247 (1997) *("Fischer II")*. The *McAuley* court quoted from *Fischer II* in relevant part:

> Serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change . . . . [T]his formulation does not turn on any single factor; the determination is inherently fact-specific. Likewise, the factors themselves are not isolated criteria; the three interact and coalesce to form a composite picture of serious consideration. For purposes of discussion, we address each in turn.
>
> The first element, a specific proposal, distinguishes serious consideration from the antecedent steps of gathering information,

developing strategies, and analyzing options. A company must necessarily go through these preliminary steps before its deliberations can reach the serious stage. This factor does not mean, however, that the proposal must describe the plan in its final form. A specific proposal can contain several alternatives, and the plan as finally implemented may differ somewhat from the proposal. What is required, consistent with the overall test, is a specific proposal that is sufficiently concrete to support consideration by senior management for the purpose of implementation.

The second element, discussion for implementation, further distinguishes serious consideration from the preliminary steps of gathering data and formulating strategy. It also protects the ability of senior management to take a role in the early phases of the process without automatically triggering a duty of disclosure. This factor recognizes that a corporate executive can order an analysis of benefits alternatives or commission a comparative study without seriously considering implementing a change in benefits. Preliminary stages also may require interaction among upper level management, company personnel, and outside consultants. These discussions are properly assigned to the preliminary stages of company deliberations. Consideration becomes serious when the subject turns to the practicalities of implementation.

> The final element, consideration by senior management with the authority to implement the change, ensures that the analysis of serious consideration focuses on the proper actors within the corporate hierarchy. As noted, large corporate entities conduct regular or on-going reviews of their benefit packages in their ordinary course of business . . . . As a general rule, such operations will not constitute serious consideration . . . . Until senior management addresses the issue, the company has not yet seriously considered a change.
>
> Consideration by senior management is also limited to those executives who possess the authority to implement the proposed change . . . . It is sufficient for this factor that the plan be considered by those members of senior management with responsibility for the benefits area of the business, and who ultimately will make recommendations to the Board [of Directors] regarding benefits operations.

McAuley, 165 F.3d at 1043-44, quoting *Fischer II,* 96 F.3d at 1539-40.

In *McAuley,* the Sixth Circuit utilized the standards articulated in *Muse* and concluded that IBM had "focused on a particular plan for a particular purpose" when the Management Committee, a group with authority to approve changes, "considered plan options and directed personnel staff to proceed to a final design." *McAuley v. IBM Corp.*, 165 F.3d at 1044. The Court specifically held that the district

court had erred in finding serious consideration only when, at a later date, the finalized proposal was placed before the Management Committee. The Sixth Circuit explained that *Muse* does not "indicate that a finalized plan in its ultimate incarnation is necessary [for serious consideration] . . . . Instead, this court used the test of *focusing* on a particular plan for a particular purpose." *Id.* Utilizing the *Fischer II* test, the Court concluded that the same event amounted to serious consideration. *Id.* at 1045.

Application

In the case at bar, plaintiffs allege that, at various points in late 1992, and in February and March 1993, representations were made to employees that Circleville would not participate in CTP because of its hiring for the Teijin Joint Venture and because of the attrition rate at the site. Plaintiff Bradney also asked his supervisor about retirement incentives in April and May 1993 and was told that none were planned. In its grant of partial summary judgment, this Court concluded that serious consideration of CTP for the Circleville plant could not have occurred prior to May 6, 1993. *(Opinion and Order,* May 8, 1998, at 34). The Court also concluded that each plaintiff's actual retirement date is the appropriate date by which to determine whether defendants breached their fiduciary duties to that plaintiff. (*Id.* at 25). If DuPont was indeed seriously considering implementing CTP at Circleville, DuPont was "obligated to correct its past predictions that the Circleville plant would not offer [the CTP] once the validity of those predictions was undermined by serious consideration of [the CTP]." *(Id.* at 26).

In resolving the issue of when serious consideration of CTP for the Circleville plant occurred, the Court finds the

testimony of Millikin most instructive because the evidence clearly establishes that, as plant manager, the decision to use CTP at Circleville was ultimately made by him. In addition, the testimony of Hartnagel, Carroll, and Waide is likewise useful because of their involvement in the events leading to Millikin's decision to utilize CTP at Circleville. Plaintiffs contend that serious consideration of CTP "occurred no later than the May 6-7, 1993 [Strategic Leadership Team] meeting in Wilmington." (*Plaintiffs' Post Trial Brief* at 15). Plaintiffs specifically point to certain portions of the evidence in support of this position. Plaintiffs refer especially to, first, Hartnagel's directive, in connection with the May 6-7 meeting, that it was necessary to "get ahead of the curve;" second, to Dillard's testimony that attrition did not ultimately solve the cost problems at Circleville; and third, to Millikin's notes following the May 12-13 meeting, *Plaintiffs' Exhibits 24 and 25.*

The Court rejects plaintiffs' reliance on Hartnagel's use of the phrase "get ahead of the curve" as evidence that the CTP was being seriously considered for Circleville as of May 6-7, 1993. Under *Muse* and *McAuley, supra,* "serious consideration" requires consideration by someone with authority to implement the change. While the testimony establishes that Hartnagel had authority to approve CTP for the entire Films SBU, the evidence is clear that there was no mandate, as of May 7, 1993, from Hartnagel or any other corporate official that Circleville implement CTP; that decision could be made only by Millikin as plant manager at Circleville. Moreover, the Court rejects plaintiffs' reliance on the testimony of Robert Dillard as evidence that CTP was undergoing serious consideration beginning May 6-7, 1993.

First, Dillard had no authority with respect to, and had no role in, the decision to implement CTP. *Depo. of Robert*

Dillard, 31, 37. Furthermore, in testifying that attrition did not suffice to achieve the required cost-cutting at Circleville, Dillard was speaking in hindsight. Indeed, he was initially surprised when he first learned that CTP had been authorized at Circleville. *Id.*, at 143. It was only after several days, and after studying the plant's revenue projections, that he concluded that attrition would be inadequate. *Id.*, at 147. This *post hoc* justification, made by one not involved in the decision-making process, simply is not determinative of the issue of the point in time that the decision to implement CTP at Circleville was seriously considered.

Plaintiffs also argue that Millikin's testimony, that CTP was not seriously considered by him until May 24, is not credible. Plaintiffs first note that Carroll testified that he discussed CTP at the May 6-7 meeting, contrary to the testimony of Millikin. It follows, in plaintiffs' eyes, that CTP was therefore seriously considered at that time. First, only Carroll testified that CTP was discussed at the May 6-7 meeting; Millikin, Hartnagel and Waide all had no recollection of a discussion of CTP at the May 6-7 meeting. Moreover, even Carroll testified that the discussion was only general in nature and did not include even the most cursory explanation of CTP. His purpose in mentioning the program was only because, as of January 1, 1993, CTP was the only tool available within DuPont to address possible personnel reductions. Finally, even this general discussion of CTP says nothing about whether or not its implementation at Circleville was at that time under serious consideration by Millikin. The Court finds that CTP was in fact generally discussed at the May 6-7 meeting, but also concludes, in light of the *Muse* and *Fischer II* tests, that that general discussion failed to rise to the level of serious consideration. That discussion amounted, at most, to preliminary deliberation, *i.e.*, the stage of

gathering data and formulating strategy by those with authority to implement CTP.

Plaintiffs also argue that CTP was seriously considered at the May 12-13, 1993 meeting of Group I in Baltimore. Plaintiffs characterize as unworthy of credit Millikin's testimony that he did not, and could not, consider CTP until the results of the zero-based restructuring analysis had been ascertained. According to plaintiffs, it was known to all at the meeting that the zero-based restructuring analysis would inevitably result in excess personnel; to argue otherwise is specious. Moreover, plaintiffs refer to Millikin's personal notes, *Plaintiffs' Exhibits 24* and *25,* which were generated either during or immediately following the May 12-13 meeting, and which, according to plaintiffs, indicate that he seriously considered CTP as of May 13.

Millikin's notes indicate that he considered a reduction in personnel at Circleville. However, the Court concludes that this consideration does not rise to the level of "serious consideration" so as to trigger a duty of disclosure under ERISA. Millikin credibly described *Exhibits 24 and 25* as his preliminary efforts to formulate strategy and to anticipate the effects of the most aggressive cost cutting measures. His testimony is supported by the fact that his notes reflect a possible 31 percent reduction in the ranks of exempt employees of the Mylar line. However, as even plaintiffs concede, the zero-based restructuring analysis would provide some indication of the actual number of positions that would be excessed. This fact is critical for a plant which, like Circleville, has more than one line of business to which employees could be redeployed, and which has a high rate of attrition.

As of May 13, Millikin was engaged in the antecedent step of developing a strategy, gathering information and analyzing options. *See, McAuley,* 165 F.3d at 1044, 1045; *Fischer II,* 96 F.3d at 1539-40. Furthermore, Millikin testified that, as of May 19, 1993, when the results of the zero-based restructuring analysis were complete, *Defendants Exhibit P,* he remained convinced that CTP would not be viable for Circleville because the program, as then formulated, would decimate the ranks of younger, skilled employees.

Plaintiffs also challenge the credibility of Millikin's testimony that he believed, until May 24, 1993, that CTP would not permit a component of volunteerism that would enable employees nearing retirement age to participate in CTP and thereby insulate the ranks of the younger, skilled Mylar employees. Again, plaintiffs refer to Millikin's notes generated after the May 12-13 meeting, in which Millikin wrote, "trade OK?" in referring to the seniority categories affected by CTP, *Plaintiffs' Exhibit 24,* p. 943, and in which Millikin seemed to anticipate that senior employees could trade CTP "packages" with less senior employees targeted by CTP. *Plaintiffs' Exhibit 25,* p. 948. Plaintiffs also refer to DuPont documents promulgated in 1992 and early 1993 which generally described the newly-instituted CTP and which seem to contemplate a component of volunteerism. *Plaintiffs' Exhibits 40, 56, 70.*

The Court nevertheless finds Millikin's testimony in this regard credible. The corporate documents reflected in *Plaintiffs' Exhibits 40, 56, 70* are only the vaguest of articulations of CTP and were not generated for the purpose or in the context of an actual implementation of the program. The record is uncontroverted that the participants in the May 12-13 meeting agreed that any actual implementation of CTP,

if any plant managers chose to implement it, would utilize RSP, a standard that does not contemplate an element of volunteerism, as a "deselection" tool. *See, .e.g., Plaintiffs' Exhibits 24, 25.* Millikin's notes do not, in this Court's estimation, undermine the credibility of his testimony that he did not believe, until May 24, 1993, that CTP could include senior employees who volunteer to participate. *Plaintiffs' Exhibit 24,* which reflects Millikin's contemporaneous notes from the May 12-13 meeting, includes the phrase "trade OK?" in reference to the two seniority categories impacted by RSP. This appears to reflect the issue, which both Millikin and Carroll testified arose during the course of this meeting, of whether or not senior employees otherwise protected from lay-off by RSP could volunteer to participate in the program. Both also testified that the answer to all such questions was negative; their testimony in this regard is consistent with all other witnesses who either participated in that meeting or were familiar with the decision-making process that ultimately resulted in the implementation of CTP. Moreover, Millikin's characterization as merely speculative the concept of "package trade," *Plaintiff's Exhibit 25,* is supported by the fact that CTP, as ultimately implemented at Circleville, did not include that feature.[10] In any event, *Plaintiffs' Exhibits 24, 25* confirm Millikin's testimony that the impact of CTP on the ranks of the younger Mylar exempt employees at Circleville was a critical factor in his consideration of whether or not to implement the program at Circleville. Furthermore, *Defendants' Exhibit P,* the results of the zero-based

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[10] In a "package trade," the more senior, volunteer, employee would step into the shoes of, and receive the financial benefits of, the less senior employee whose job would thereby be saved. As actually implemented, those volunteering to participate in CTP apparently received financial benefits calculated by reference to their own employment history.

restructuring analysis utilizing RSP as a deselection tool and which identified a number of less senior employees, also supports Millikin's testimony in this regard. Finally, Carroll and Waide both testified that Millikin regarded this issue as crucial to Millikin's decision and that Millikin's concerns were justified in light of the original formulation of CTP after the May 12-13 meeting. It was on account of Millikin's concerns that Carroll consulted Reynolds on May 21, 1993 about incorporating a component of volunteerism into any implementation of CTP. As the record is clear, it was not until May 24, 1993 that Reynolds communicated to the members of Group I that Millikin's request for a component of volunteerism had been approved and that any implementation of CTP could include a "solicitation of interest."

The Court concludes that Millikin's consideration of the application of CTP at Circleville prior to May 24 amounted to only a preliminary stage in the process rather than serious consideration. As the *Fischer II* court stated, corporate executives can order an analysis of benefits and interact with each other in their deliberations without triggering a duty of disclosure. In contrast, "[c]onsideration becomes serious when the subject turns to the practicalities of implementation." *Fischer II,* 96 F.3d at 1540. The Court concludes that, in the case at bar, consideration of CTP for Circleville became serious at the meeting of Group I on May 24, 1993, when Carroll announced that Reynolds had approved the solicitation of "expressions of interest" in connection with any implementation of CTP. Millikin credibly testified that this was the first time that he thought that CTP could be appropriate for the Circleville plant. It was only at this point that the CTP proposal was sufficiently concrete to support consideration by those with authority to implement it; as of May 24, 1993, Millikin "focused on a particular plan for

a particular purpose," thereby giving serious consideration to CTP. Prior to that date, defendants had no duty of disclosure to plaintiffs or to any other Circleville employees. As the Sixth Circuit cautioned in *Swinney v. GM Corp.*, 46 F.3d 512 (6th Cir. 1995), the duty of disclosure does not impose upon the employer a duty of "'clairvoyance; *i.e.*, to predict accurately the future availability of benefits.'" *Id.* at 520, quoting *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988).

In sum, plaintiffs have failed to persuade the Court that serious consideration of CTP for Circleville occurred prior to May 24, 1993. Consequently, plaintiffs' claims of breach of fiduciary duty in failing to disclose plans to implement CTP must fail.

B. Discrimination

Plaintiffs also claim that DuPont violated 29 U.S.C. §1140. This section of ERISA prohibits discrimination "against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . . " 29 U.S.C. §1140.

In order to establish a violation of this section, plaintiffs must show that there was: "'(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee[s] may become entitled.'" *Humphreys v. Bellaire,* 966 F.2d 1037, 1043 (6th Cir. 1992), quoting *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3rd Cir. 1987). Plaintiffs must establish that the defendants formed the specific intent to violate ERISA in order to establish a violation of §1140. *See, Id.* While

plaintiffs need not establish that the defendants' sole purpose was to interfere with plaintiffs' pension benefits, they must establish that such an improper purpose was a "motivating factor" in the decision. *Id.*, citing *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 127 (7th Cir. 1991). Furthermore, the temporal proximity of the alleged illegal conduct to the employees' eligibility for the benefit creates at least some inference of intentional prohibited activity. *Id.* at 1044; *Sahid v. Ford Motor Co.*, 76 F.3d 1404, 1413 (6th Cir. 1996). If the plaintiffs establish a *prima facie* case, the burden then shifts to the defendants to introduce admissible evidence of a "legitimate, nondiscriminatory reason for [their] challenged actions." *Id.*, citing *Gavalik*, 812 F.2d at 853.

Plaintiffs argue that DuPont engaged in discrimination violative of §1140 when DuPont officials made repeated statements that Circleville would never[11] offer an early retirement incentive as long as it was hiring for the Teijin Joint Venture. Defendants argue that, in the absence of serious consideration of CTP, the statements, even if made, were not misrepresentations and did not violate §1140. This Court agrees. Based on the evidence presented, plaintiffs have failed to meet their burden of establishing that the statements regarding Circleville's participation in CTP were made with any intent to interfere with plaintiffs' retirement benefits. In sum, plaintiffs' discrimination claims under §1140 are likewise without merit.

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[11] As stated in this Court's May 6, 1998 *Opinion and Order*, whether the term "never" was used is of no significance. Based on the evidence presented, the Court concludes that this term was not in fact used; rather, plaintiffs were told that it was not foreseeable that CTP would be offered in light of the hiring opportunities and anticipated rate of attrition at Circleville.

C. Equitable Estoppel

Plaintiffs also claim that DuPont should be equitably estopped from denying plaintiffs benefits under the CTP. The United States Court of Appeals for the Sixth Circuit has held that, generally, "because of federal preemption under 29 U.S.C. §1144, state law theories, including estoppel, cannot support a claim for benefits under an ERISA plan." *Bond v. GM Acceptance Corp.*, No. 96-3945, 1998 WL 58256, at *3 (6th Cir. Feb. 5, 1998); *see also Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991). In *Bond,* plaintiffs sought to participate in a pension plan offered following their retirement; plaintiffs alleged that it was only misleading statements made prior to their retirement that foreclosed their participation in the later plan. Relying *on Armistead v. Vernitorn Corp.*, the Court held that, because plaintiffs' claim essentially sought to expand the coverage previously offered, rather than to clarify an ambiguous plan provision, plaintiffs' claim was subsumed in their claim for breach of fiduciary duty under §1104. Furthermore, in *Muse v. IBM Corp.*, 103 F.3d 490 (6th Cir. 1996), the Court held that "[s]tate law claims based on an employer's alleged misrepresentations about the availability of a benefit plan are sufficiently 'related to' an ERISA plan to be preempted by the statute." *Id.* at 495, citing *Swinney v. GM Corp.*, 46 F.3d 512 (6th Cir. 1995).

The Court concludes that *Bond* and *Muse* are controlling in the instant action. Plaintiffs' claims for equitable estoppel are subsumed in their breach of fiduciary duty claims and are therefore not separately actionable. Even assuming that plaintiffs' equitable estoppel claims were actionable, they would nonetheless fail because, as this Court concluded *supra,* the statements by DuPont officials, which plaintiffs characterize as misrepresentations, were in fact

accurate when made. In sum, plaintiffs' equitable estoppel claims are without merit.

CONCLUSIONS OF LAW

The Court concludes that plaintiffs' claims against DuPont for breach of fiduciary duty, discrimination and equitable estoppel are without merit. It is therefore **RECOMMENDED** that **FINAL JUDGMENT** on all of plaintiffs' claims be entered in favor of defendants.

If any party seeks review by the District Judge of this *Report and Recommendation,* that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation,* specifically designating this *Report and Recommendation,* and the part thereof in question as well as the basis for objection thereto. 28 U.S.C. §636 (b) (1) .

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation. See Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teachers, Local 231, etc.*, 829 F.2d 1370 (6th Cir. 1987); *Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994).

/s/_____
Norah McCann King
United States Magistrate Judge